STATE OF MICHIGAN

COURT OF APPEALS

FIFTH THIRD BANK,

Plaintiff/Counter-Defendant-Appellant,

v

DANOU TECHNICAL PARK, LLC,

Defendant-Appellee,

and

SMD ESTATE, INC.,

Defendant/Counter-Plaintiff-Appellee.

UNPUBLISHED
March 20, 2012

No. 302884
Wayne Circuit Court
LC No. 09-031350-CH

Before: SAAD, P.J., and K. F. KELLY and M. J. KELLY, JJ.

PER CURIAM.

In this suit to quiet title, Fifth Third Bank appeals by right the trial court's order denying its cross-motion for summary disposition and granting summary disposition in favor SMD Estate Inc. and Danou Technical Park, LLC (Danou Technical). The primary issue in this case is whether the mortgage that Danou Technical obtained on the property at issue remained enforceable after Danou Technical obtained title to the property. In its summary disposition motion, Fifth Third presented evidence that the mortgage did not secure an existing debt; specifically, it presented evidence that the note that the mortgage secured had been paid in full. Because Danou Technical Park and SMD Estate failed to present evidence that established a question of fact as to whether the note at issue had been fully paid, the trial court should have granted Fifth Third's cross-motion for summary disposition and declared that the note at issue had been paid in full and that the mortgage underlying the note was a nullity. Consequently, Fifth Third was entitled to have the trial court quiet title in the property at issue. For this reason, we reverse the trial court's order and remand for entry of judgment in Fifth Third's favor.

I. BASIC FACTS AND PROCEDURAL HISTORY

Samir Danou owns Danou Technical. In 2001, Danou Technical owned vacant real estate on Southfield Road in Allen Park, Michigan (the Southfield Property), which it hoped to sell to Home Depot. Because the sale would result in significant taxable gain, Danou Technical decided to invest the proceeds from the sale of the Southfield Property to purchase another property in a non-taxable exchange of real property under 26 USC § 1031. Danou Technical found property on Enterprise Drive and Oakwood Boulevard in Allen Park (the Enterprise Property) that it determined would be suitable for the exchange. However, the owner of the Enterprise Property wanted to sell its property immediately; it did not want to wait until Danou Technical sold the Southfield Property. Accordingly, Danou Technical entered into an agreement to purchase the Enterprise Property in October 2000.

In order to qualify for the favorable tax exchange, Danou Technical contracted with a California company to serve as an exchange agent for the transfer. The exchange agent created a limited liability company in Nevada, API Properties Eighty-Nine, LLC (API Properties), to hold the Enterprise Property for transfer to Danou Technical after Danou Technical sold the Southfield Property to Home Depot. In February 2001, Danou Technical entered into a qualified exchange accommodation agreement with API Properties. In that agreement, Danou Technical assigned its rights in the contract for the purchase of the Enterprise Property to API Properties. The agreement also provided that API Properties' sole financial obligation would be to use the funds advanced to it to purchase the Enterprise Property. It would then transfer the subject property to Danou Technical "at a value equal to the Purchase Price . . . ."

In February 2001, Danou Technical also borrowed $5,250,000 from Old Kent Bank, which was the predecessor in interest to Fifth Third Bank (Fifth Third),[1] to finance the purchase of the Enterprise Property. Danou Technical granted Fifth Third a mortgage on its Southfield Property to secure the loan. API Properties then acquired the Enterprise Property with the money Fifth Third loaned to Danou Technical along with $3 million of Danou Technical's own funds.

API Properties executed a note in favor of Danou Technical for the full $8,250,000 on February 12, 2001; it also provided Danou Technical with a mortgage on the Enterprise Property (the API Note and the API Mortgage). The API Note provided that API Properties would repay the full amount in 180 days with no interest, but also provided that the note was non-recourse—that is, Danou Technical's sole remedy in the event that API Properties failed to pay the API Note in full would be to foreclose against the Enterprise Property.

In March 2001, Danou Technical assigned the API Note and Mortgage to Fifth Third as further security for the $5,250,000 loan to Danou Technical. The parties agreed in the assignment that, in the event of a default by Danou Technical, Fifth Third could at its option assume Danou Technical's position in the API Note and Mortgage. Further, Danou Technical

[1] For ease of reference, we shall refer to Old Kent and its successors as Fifth Third.

agreed to appoint Fifth Third as its attorney-in-fact with regard to the API Note and Mortgage effective following any default and agreed that the appointment would be irrevocable.

Danou Technical's proposed sale of the Southfield property to Home Depot ultimately failed. As a result, Danou Technical could not purchase the Enterprise Property from API Properties using the proceeds from the Southfield Property—that is, it could no longer make a qualified non-taxable exchange. Accordingly, on August 9, 2001, API Properties transferred the Enterprise Property to Danou Technical through a quitclaim deed. API Properties transferred the Enterprise Property to Danou Technical—as contemplated under the various agreements—within 180 days from the date that it executed the API Note and Mortgage. After the transfer, API Properties had no assets and was dissolved.

In August 2001, Danou Technical granted Fifth Third a mortgage on the Enterprise Property (the Danou Mortgage) that it had just acquired from API Properties as additional security for its $5,250,000 loan from Fifth Third. Because the Danou Mortgage was recorded after the original API Mortgage, the API Mortgage was—to the extent that it had continuing legal effect—first in priority. In addition, in February 2002, Danou Technical and Fifth Third agreed to amend the terms of the note evidencing Fifth Third's $5,250,000 loan to Danou Technical and to enter into an agreement to modify the terms of the API Mortgage. The parties agreed that the API Note and Mortgage remained in "full force and effect" except as modified in the mortgage modification agreement. The agreement further provided that it was the parties desire to amend the mortgage to modify the principal amount that is subject to the Fifth Third loan and, to that end, the parties agreed that the principal amount secured by the API Mortgage was $5,250,000.

Danou Technical defaulted on the note with Fifth Third in 2008 and Fifth Third accelerated the debt. Fifth Third then foreclosed on the Enterprise Property under the Danou Mortgage, rather than the API Mortgage. In May 2009, Fifth Third purchased the Enterprise Property at a sheriff's sale with a full credit bid—that is, the bid equaled the amount that Danou Technical owed to Fifth Third. Accordingly, after the foreclosure, Danou Technical no longer owed Fifth Third anything under the $5,250,000 loan. See *New Freedom Mtg Corp v Globe Mtg Corp*, 281 Mich App 63, 68; 761 NW2d 832 (2008). After the expiration of the redemption period, title to the Enterprise Property vested in Fifth Third.

At some point Samir Danou created a new company, SMD Estate, Inc. In an affidavit, Samir Danou averred that SMD Estate was created to assist in his estate planning. On November 24, 2009, after Fifth Third acquired the Enterprise Property, Danou Technical purported to assign its interest in the API Note and Mortgage to SMD Estate. On the same day, SMD Estate—through its president, Samir Danou—demanded that Fifth Third discharge the assignment of the API Note and Mortgage and return the original documents to SMD Estate. Fifth Third refused to return the originals or discharge the assignment. SMD Estate then initiated foreclosure proceedings against the Enterprise Property—ostensibly to enforce a debt remaining under the API Note.

In December 2009, Fifth Third sued Danou Technical and SMD Estate in order to quiet its title to the Enterprise Property and halt the foreclosure proceedings. Fifth Third alleged that SMD Estate could not foreclose under the API Mortgage because that mortgage ceased to exist under the doctrine of merger when API Properties transferred the Enterprise Property to Danou Technical. Fifth Third also alleged that API Properties fully performed under the terms of the API Note by transferring the Enterprise Property to Danou Technical. Because API Properties fully performed under the terms of its note, Fifth Third further maintained, there is no debt to support the API Mortgage. Accordingly, the API Mortgage is a nullity. Fifth Third also alleged that, even if the API Mortgage survived the merger and was supported by a debt, after Danou Technical's default, it had the absolute right to discharge the mortgage. Finally, Fifth Third alleged that title to the Enterprise Property should be quieted on equitable grounds. On the basis of these allegations, Fifth Third asked the trial court to clear the Enterprise Property from all claims by Danou Technical and SMD Estate.

In January 2010, SMD Estate counter-sued Fifth Third. In its counter-complaint, SMD Estate alleged that it was the successor to Danou Technical's rights in the API Note and Mortgage and that Fifth Third had an obligation to discharge Danou Technical's assignment of the API Note and Mortgage given that Danou Technical no longer owed Fifth Third under the terms of the note evidencing the $5,250,000 loan. For these reasons, SMD Estate asked the trial court to order Fifth Third to return the original API Note and Mortgage and asked it to declare that the API Note and Mortgage were enforceable. It also asked the trial court to declare that it could proceed with its foreclosure.

In November 2010, Danou Technical and SMD Estate moved for summary disposition. They argued that there was no question of fact that the API Note and Mortgage remained valid and enforceable and, because Danou Technical no longer owed Fifth Third on the note for $5,250,000, Fifth Third had an obligation to return the API Note and Mortgage to SMD Estate.

Fifth Third cross-moved for summary disposition in December 2010. In relevant part, Fifth Third argued that API Properties fully performed under the API Note and the exchange accommodation agreement. As such, there was no debt remaining on the API Note. Without an underlying debt, Fifth Third argued, the API Mortgage was a nullity.

After holding a hearing on the parties' cross-motions, the trial court determined that—as a matter of law—the API Note and Mortgage were enforceable. It further determined that Fifth Third had to return the API Note and Mortgage to SMD Estate and that SMD Estate could foreclose against the Enterprise Property to recover under the API Note.

This appeal followed.

II. ANALYSIS

A. STANDARDS OF REVIEW

This Court reviews de novo a trial court's decision on a motion for summary disposition. *Barnard Mfg Co, Inc v Gates Performance Engineering, Inc*, 285 Mich App 362, 369; 775 NW2d 618 (2009). This Court also reviews de novo the proper interpretation of a contract and the legal effect of a contract clause. *Rory v Continental Ins Co*, 473 Mich 457, 464; 703 NW2d

23 (2005). Finally, the proper scope and application of the common law is a question of law that this Court reviews de novo. See *Michigan Citizens for Water Conservation v Nestlé Waters North America, Inc.*, 269 Mich App 25, 53, 709 NW2d 174 (2005), rev'd not in relevant part, 479 Mich 280 (2007).

B. THE API MORTGAGE

In this case, the parties dispute whether the API Mortgage had any continuing validity after API Properties quitclaimed its interest in the Enterprise Property to Danou Technical. Although the parties spent a significant amount of time discussing the doctrine of merger, we conclude that the dispositive question is whether any debt remained on the API Note after API Properties quitclaimed the Enterprise Property to Danou Technical.[2]

It is well-settled that, in Michigan, a mortgage is not an estate in land—it is a lien on real property intended to secure performance or payment of an obligation. *Prime Financial Services LLC v Vinton*, 279 Mich App 245, 256; 761 NW2d 271 (2008). Because a mortgage is merely a security interest, it has no validity in the absence of an underlying debt:

> A mortgage is a mere security interest incident to an underlying obligation, and the transfer of a note necessarily includes a transfer of the mortgage with it. [*Ginsberg v Capitol City Wrecking Co*, 300 Mich 712, 717; 2 NW2d 892 (1942).] For the same reason, a transfer of a mortgage without the underlying obligation "is a mere nullity." *Id.*; see also *Cummings v Continental Tool Corp*, 371 Mich 177, 183; 123 NW2d 165 (1963) (noting that a mortgage without an underlying enforceable obligation fails as a matter of law). [*Prime Financial*, 279 Mich App at 257.]

Accordingly, the discharge of a note that is secured by a mortgage necessarily results in the discharge of the mortgage. *Fox v Mitchell*, 302 Mich 201, 212; 4 NW2d 518 (1942) ("Although the mortgage contains a covenant to pay the indebtedness, evidenced by the terms of the promissory note, the discharge of the note where no intention was manifested to retain any liability on the mortgage would discharge the mortgage. The mortgage follows the note."). Similarly, the payment in full on a note discharges the note and the underlying mortgage. See *Byles v Kellogg*, 67 Mich 318,320; 34 NW 671 (1887) ("The mortgage cannot survive the debt that it secured, where that debt has been paid to the holder of the mortgage by the debtor."). As our Supreme Court explained, once a note has been paid in full, the debt ceases to exist and the mortgage ceases to have legal effect:

> These propositions, being established, the necessary result is that the mortgage instrument, without any debt, liability or obligation secured by it, can have no present legal effect as a mortgage or an incumbrance upon the land. It is but a shadow without a substance, an incident without a principal; and it can make

[2] For that reason, and given our resolution of this issue, we decline to address the parties' remaining claims of error.

> no difference in the result whether there has once been a debt or liability which has been satisfied, or whether the debt or liability to be secured has not yet been created, and it requires, as in this case, some future agreement of the parties to give it existence. At most, the difference is only between the nonentity which follows annihilation, and that which precedes existence. [*Ladue v Detroit & Milwaukee RR Co*, 13 Mich 380, 396-397 (1865); see also See *Plasger v Leonard*, 312 Mich 561, 564; 20 NW2d 296 (1945) ("The mortgagee had no estate in land but only a chose in action. After a debt is discharged, an assignment of a mortgage without the debt is a mere nullity.").]

As the current owner of the Enterprise Property, Fifth Third generally had the right to assert any defense that API Properties could have asserted to a foreclosure action. See *American Trust Co v Michigan Trust Co*, 263 Mich 337, 340; 248 NW 829 (1933) ("Defendant, as owner of the property mortgaged, stands in a position of the mortgagor."). In its motion for summary disposition, Fifth Third argued that API Properties' transfer of the Enterprise Property constituted full performance under the API Note and the related exchange accommodation agreement. Fifth Third also noted that Danou Technical could provide no evidence to show that API Properties still owed Danou Technical anything after the transfer. Proof that there is nothing due under a note and mortgage is an absolute defense to foreclosure. See *Bowen v Brogan*, 119 Mich 218, 220; 77 NW 942 (1899) (stating that is was "evident there was nothing due upon the mortgage when it was foreclosed, and the right to foreclose it did not exist, and no legal title was obtained by the foreclosure."). Indeed, had API Properties wanted, it could have sued for the discharge of the mortgage on the basis that it fully performed under the terms of the API Note and Mortgage. See MCL 600.3175(1) (giving the owner of property the right to sue to discharge a mortgage on the grounds that the mortgage has been paid or satisfied). Once Fifth Third made this properly supported motion, the burden shifted to Danou Technical and SMD Estate to present evidence that established a question of fact as to whether the API Note had been paid in full. See *Barnard Mfg*, 285 Mich App at 374. But Danou Technical and SMD Estate did not present any evidence from which it could be inferred that there was any remaining debt under the API Note.

A plain reading of the API Mortgage shows that its sole purpose was to secure the debt evidenced by the API Note. Indeed, the API Mortgage provides that it is to secure the "principal sum of $8,250,000" borrowed under the "Note of even date herewith." The API Note in turn provided that API Properties would repay $8,250,000 to Danou Technical on or before "180 days from the date [of the API Note]", which was dated February 2, 2001. Danou Technical and API Properties did not provide for any obligations other than to repay the debt evidenced in the API Note. They also did not limit the manner by which API Properties could satisfy the debt in either the API Note or the API Mortgage. In the API Note, Danou Technical and API Properties further agreed that the note would not bear interest if paid within the maturity date. And the parties agreed that Danou Technical was authorized to apply to the payment of the note "any sum of money or other property belonging to [API Properties] . . . deposited or otherwise in the hands of holder . . . ."

The undisputed evidence submitted to the trial court with the parties' motions for summary disposition also showed that API Properties quitclaimed the Enterprise Property to Danou Technical on August 9, 2001. API Properties transferred the subject property—which

clearly had a substantial value—to Danou Technical within 180 days from the date that it executed the API Note. Thus, API Properties plainly made a payment, albeit in property rather than cash, to Danou Technical within the 180 day maturity date. As such, the transfer occurred before the API Note accrued any interest. If this transfer satisfied the full amount of the debt under the API Note, then the note was paid in full and the accompanying mortgage became a nullity. See *Ladue*, 13 Mich at 380; *Byles*, 67 Mich at 320; *Plasger*, 312 Mich at 564.

Given that API Properties purchased the property for $8,250,000 less than 6 months earlier, the property must have had a substantial value at the time of the transfer to Danou Technical. Nevertheless, the parties did not present evidence concerning the actual value of the Enterprise Property at the time API Properties quitclaimed it to Danou Technical.[3] Despite this lack of evidence, it is plain that API Properties' transfer of the Enterprise Property fully satisfied the debt owed to Danou Technical under the API Note.

On February 9, 2001, API Properties entered into an exchange accommodation agreement with Danou Technical regarding the purchase of the Enterprise Property. In that agreement, the parties agreed that API Properties would acquire the Enterprise Property and that API Properties would do so using the proceeds of a loan or advance from Danou Technical. They also provided that the loan or advance would be evidenced by a note that would be secured by a mortgage on the Enterprise Property. Finally, Danou Technical agreed that API Properties would transfer the Enterprise Property to Danou Technical and that it would be transferred at "a value equal to the Purchase Price plus all costs of purchase to be charged to [API Properties] and less all credits received by [API Properties] pursuant to the Purchase Contract." That is, Danou Technical agreed that API Properties' transfer of the Enterprise Property to Danou Technical would be valued at the purchase price for the Enterprise Property, which was $8,250,000. Accordingly, when API Properties transferred the Enterprise Property to Danou Technical on August 9, 2001—within the 180 day maturity date—it effectively paid the API Note in full. After that transfer, there was no remaining debt and the API Mortgage ceased to exist as a matter of law. *Id.* Because there was no remaining debt underlying the API Note, even assuming that Danou Technical could transfer the API Note and Mortgage to SMD Estate, SMD Estate could not foreclose under that mortgage. To hold otherwise would be to allow SMD Estate to force the sale of a property to pay a debt that does not exist.

We are also not persuaded by the argument that API Properties' failure to transfer the Enterprise Property using a warranty deed or otherwise in a manner that warranted that there

[3] The short time between the purchase and the transfer strongly suggests that the property still had a value close to $8,250,000—the value given the property in the most recent arms length transaction. Accordingly, even if Danou Technical and API Properties had not provided that the property should be valued at $8,250,000, API Properties was still entitled to a substantial credit—if not a full credit—on the amount owed under the API Note. And it was Danou Technical and SMD Estate's obligation to respond to Fifth Third's motion with evidence that API Properties' transfer satisfied less than the full amount of the debt under the API Note. *Barnard Mfg*, 285 Mich App at 374.

were no new encumbrances leaves a debt remaining under the API Note. First, the API Note requires only the payment of the $8,250,000; it does not specify how that amount should be paid. Second, although the exchange accommodation agreement does mention a transfer free of liens, there is no evidence that the actual transfer was subject to any new liens created by API Properties. Third, Fifth Third could not, through an agreement with Danou Technical, bind API Properties or otherwise preclude API Properties from fully performing under the terms of the API Note.[4] Finally, the evidence shows that Danou Technical asked API Properties to transfer the Enterprise Property through a quitclaim deed.[5] And Danou Technical—and its successor in interest, SMD Estate—cannot now be heard to complain that API Properties breached the exchange accommodation agreement by complying with Danou Technical's request. When Danou Technical asked for and accepted the quitclaim deed from API Properties, it received the transfer contemplated under the exchange accommodation agreement and, per that agreement, had to value that transfer at $8,250,000.[6] Consequently, there is undisputed evidence that, as a matter of law, API Properties' transfer of the Enterprise Property to Danou Technical constituted full payment of the API Note.

III. CONCLUSION

The trial court erred when it determined that the API Note and Mortgage had continuing validity after API Properties transferred the Enterprise Property to Danou Technical. Because there was no factual dispute concerning whether the API Note had been paid in full, the trial court should have concluded that—as a matter of law—the API Mortgage had no continuing validity and SMD Estate could not commence a foreclosure action to secure payment of a non-existent debt. Consequently, the trial court should have granted Fifth Third's request for quiet title. For these reasons, we vacate the trial court's order and declaratory judgment of February 11, 2011 and remand this matter for entry of an order and judgment denying Danou Technical

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[4] We also reject Danou Technical and SMD Estate's claims that Fifth Third should be estopped from asserting that API Properties' transfer of the property extinguished the debt. The effect that the transfer had on the note and mortgage is a matter of law that does not implicate equitable estoppel. See *Van v Zahorik*, 460 Mich 320, 335; 597 NW2d 15 (1999).

[5] In fact, there is undisputed evidence that one of Danou Technical's lawyers prepared the quitclaim deed and requested the transfer from API Properties.

[6] Danou Technical and SMD Estate attempt to characterize the request for a quitclaim deed as originating with Fifth Third. The implication being that Danou Technical did not agree to modify the exchange accommodation agreement. However, Fifth Third was not a party to the exchange accommodation agreement; Danou Technical and API Properties were the only parties to that agreement. By requesting a quitclaim deed, Danou Technical agreed that such a transfer would satisfy the terms of the exchange accommodation agreement. And Danou Technical and API Properties were free to modify their agreement in this way. See *Quality Products & Concepts Co v Nagel Precision, Inc*, 469 Mich 362, 372; 666 NW2d 251 (2003) (recognizing that the parties to a contract can agree to modify or waive the terms of their agreement).

and SMD Estate's motion for summary disposition, granting Fifth Third's cross-motion for summary disposition, and quieting title to the Enterprise Property in Fifth Third.

Reversed and remanded for entry of an order and judgment consistent with this opinion. We do not retain jurisdiction. As the prevailing party, Fifth Third may tax its costs. MCR 7.219(A).

/s/ Henry William Saad
/s/ Michael J. Kelly

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K. F. KELLY. (*concurring*).

I concur with the majority's opinion, but write separately because I would also conclude that reversal is appropriate in light of the plain language of the contractual documents and the default or breach of contract by defendant Danou Technical Park, LLC (DTP).

I. Applicable Facts and Procedural History

On March 30, 2001, DTP entered into a collateral assignment of mortgage with plaintiff's predecessor, Old Kent Bank. The agreement provided in relevant part:

> 1. **Collateral Assignment**. Borrower [DTP] hereby assigns all of its right, title and interest in and to the API Mortgage to Lender [plaintiff], such assignment to be as additional collateral for payment by Borrower to Lender of the Old Kent Loan. Borrower further collaterally assigns to Lender the API Note. For the purposes of this Agreement, the API Note and the API Mortgage are sometimes collectively referred to as the "API Security Documents." Until the payment in full of all amounts due and owing under the Old Kent Loan, Borrower shall not gibe [sic] any consents, approvals or waivers under the API Security Documents without Lender's prior written consent which consent may be

withheld in its sole and absolute discretion. *Upon the occurrence of any event of default under the Old Kent Loan, the Lender may, at its option, assume the position of Borrower with respect to the API Security Documents and exercise all of Borrower's rights pursuant thereto, but in no event shall this Assignment be construed to obligate Lender to take any action with respect to the API Security Documents and exercise all of Borrower's rights pursuant thereto, but in no event shall this Assignment be construed to obligate Lender to take any action with respect to the API Security Documents or any obligation of Borrower with respect thereto. Following such an event of default, the Lender may deal directly with the API with respect to the API Security Documents without the prior consent or joinder of Borrower*.

* * *

4. **Release**. Upon payment in full of the Old Kent Loan, Lender shall release this Collateral Assignment.

* * *

8. **Appointment of Lender**. *Borrower hereby makes constitutes and appoints Lender its true and lawful attorney-in-fact, effective following an event of default, with full power of substitution, effective following the occurrence of any default, to take any action in furtherance of this Assignment, including without limitation, the signing of financing statements, endorsing of instruments, and, the execution and delivery of all documents and agreements necessary to obtain or accomplish any protection for or collection, disposition or enforcement of any part of the API Security Documents and the Exchange Agreement. Such appointment shall be deemed irrevocable and coupled with an interest.* [Emphasis added.]

On February 23, 2002, plaintiff and DTP executed a mortgage modification agreement. The purpose of the mortgage modification agreement was to reduce the principal amount of the API mortgage to $5,250,000. This modification agreement expressly provided that "all other terms and conditions of the API Mortgage and Collateral Assignment shall remain in full force and effect." It is undisputed that DTP defaulted on its obligation to repay plaintiff. Plaintiff purchased the disputed property at the foreclosure sale with a full credit bid, and DTP did not redeem the property.

On November 24, 2009, Samir A. Danou, president of defendant SMD Estate, Inc. (SMD), notified plaintiff that DTP had assigned its "rights to the API Mortgage and API Note" to SMD. The letter asserted that plaintiff was required to release the collateral assignment upon payment in full of the Old Kent Loan, and the loan was satisfied on May 6, 2009. This litigation ensued to quiet title to the property subject to the API mortgage and note.

II. Applicable Law

Issues regarding the proper interpretation of a contract or the legal effect of a contractual clause are reviewed de novo. *Fodale v Waste Mgt of Michigan, Inc*, 271 Mich App 11, 16-17;

718 NW2d 827 (2006). When interpreting a contract, the examining court must ascertain the intent of the parties by evaluating the language of the contract in accordance with its plain and ordinary meaning. *In re Egbert R Smith Trust*, 480 Mich 19, 24; 745 NW2d 754 (2008). If the language of the contract is clear and unambiguous, it must be enforced as written. *Id*. A contract is unambiguous, even if inartfully worded or clumsily arranged, when it fairly admits of one interpretation. *Holmes v Holmes*, 281 Mich App 575, 594; 760 NW2d 300 (2008). Every word, phrase, and clause in a contract must be given effect, and contract interpretation that would render any part of the contract surplusage or nugatory must be avoided. *Woodington v Shokoohi*, 288 Mich App 352, 374; 792 NW2d 63 (2010). The intent of the parties is determined from the four corners of the contract. *Rogers v Great Northern Life Ins Co*, 284 Mich 660, 666; 279 NW 906 (1938). The contract must be construed as a whole, and all parts of the contract must be harmonized if possible. *Czapp v Cox*, 179 Mich App 216, 219; 445 NW2d 218 (1989).

"The essential elements of a contract are parties competent to contract, a proper subject matter, legal consideration, mutuality of agreement, and mutuality of obligation." *Mallory v City of Detroit*, 181 Mich App 121, 127; 449 NW2d 115 (1989). A substantial breach of a contract provides a basis to rescind the contract. *Rosenthal v Triangle Dev Co*, 261 Mich 462, 463; 246 NW 182 (1933). A substantial breach includes a failure to perform a substantial part of the contract or one of its essential terms or where the contract would not have been executed if default regarding a specific provision had been expected or contemplated. *Id*. "It is not every partial failure to comply with the terms of a contract by one party which will entitle the other party to abandon the contract at once." *Id*. A merely technical breach does not fall within the class where rescission is permitted. *Id*. at 464. "One consideration in determining whether a breach is material is whether the nonbreaching party obtained the benefit which he or she reasonably expected to receive." *Holtzlander v Brownell*, 182 Mich App 716, 722; 453 NW2d 295 (1990).

Generally, one who first breaches a contract cannot maintain an action against the other contracting party for his subsequent breach or failure to perform. *Flamm v Scherer*, 40 Mich App 1, 8-9; 198 NW2d 702 (1972). However, the "first breach" rule only applies when the initial breach is substantial. *Michaels v Amway Corp*, 206 Mich App 644, 650; 522 NW2d 703 (1994). A party who fails to perform a condition precedent of the contract loses the right to require the other party to further fulfill the terms of the contract. *Wolverine Packing Co v Hawley*, 251 Mich 215, 219; 231 NW 617 (1930). "Specific performance is a matter of grace, not of right." *Id*. Consequently, when a party fails to make payments pursuant to the terms of an installment contract, the nonbreaching party is entitled to rescission of the contract and need not perform its own obligations. *Id*.

III. Application of Law to the Facts

Pursuant to the plain language of the collateral assignment, *In re Egbert R Smith Trust*, 480 Mich at 24, DTP is not entitled to a return of any right, title and interest in the API mortgage

and note because of its default.[1] DTP committed a substantial breach of contract by failing to repay plaintiff the outstanding obligation owed to it. *Rosenthal*, 251 Mich at 463. A party who first breaches a contract is not entitled to raise a claim premised on the other party's failure to perform. *Flamm*, 40 Mich App at 8-9. Additionally, a breaching party is not entitled to specific performance of the remainder of contract. *Wolverine Packing Co*, 251 Mich at 219.

According to the terms of the collateral assignment, DTP agreed that, in the event of default, plaintiff had the right to assume DTP's position. It was further agreed that in light of a breach, plaintiff was entitled to deal directly with API without the consent of DTP. Finally, upon DTP's default, plaintiff was appointed DTP's true and lawful attorney-in-fact. This appointment allowed plaintiff to be substituted in place of DTP and entitled it to "take any action" in furtherance of the collateral assignment. This appointment was irrevocable. Consequently, DTP assented to plaintiff's substitution in its place regarding any action to be taken with regard to the API security documents. DTP does not dispute the terms of the collateral assignment and its agreement to the terms. *Mallory*, 181 Mich App at 127. DTP does not dispute that it defaulted on its obligation. Therefore, DTP does not have any right, title or interest in the API security documents.

In light of DTP's agreement to the terms of the collateral assignment, it forfeited the right to pursue any action regarding the API security documents. Rather, the right transferred to plaintiff upon DTP's default. The fact that plaintiff did not seek to foreclose on the API security documents is irrelevant. In light of DTP's default, plaintiff held the right to enforce its own interests as well as the interest of DTP. DTP's breach or default precludes it from reacquiring the API security documents. Accordingly, I agree that the trial court's decision must be reversed.

/s/ Kirsten Frank Kelly

[1] This case may be resolved on the basis of the plain language of the mortgage modification agreement and collateral assignment, and the evidence of the parties' intent from the four corners of the documents. Accordingly, parol evidence need not be considered. See *NAG Enterprises, Inc v All State Indus, Inc*, 407 Mich 407, 409-410; 285 NW2d 770 (1979).