

NO. CV 20-6132325-S : SUPERIOR COURT  
AMOS FINANCIAL LLC : J.D. OF HARTFORD  
VS. : AT HARTFORD  
D & K HOLDING COMPANY LLC,  
LINCOLN HOLDINGS LLC AND  
360 FEDERAL CREDIT UNION : NOVEMBER 9, 2021

**MEMORANDUM OF DECISION**  
**MOTION TO STRIKE SUPPLEMENTAL AFFIDAVIT (#130)**  
**MOTIONS FOR SUMMARY JUDGMENT (#121 and #123)**

This foreclosure action was filed by the plaintiff, Amos Financial LLC, by writ, summons and complaint on September 8, 2020, against the defendants, D & K Holding Company LLC (D & K),<sup>1</sup> Lincoln Holdings LLC and 360 Federal Credit Union, alleging the following facts: On July 29, 1999, D & K signed a promissory note in the sum of \$66,000 payable to the order of Federal Financial Co. (Federal Financial),<sup>2</sup> secured by a mortgage deed on a parcel of land located at 114 Broad Brook Street, Enfield, Connecticut. The mortgage was

<sup>1</sup> The mortgaged property, in dispute was sold by D & K Holding to Lincoln Holdings, LLC via warranty deed on May 15, 2020, and recorded on the Enfield Land Records on May 22, 2020.

<sup>2</sup> Federal Financial, a general partnership between the plaintiff and Federal Refinance Co., was dissolved by way of a letter agreement dated April 1, 2010. According to the agreement, the partners agreed to convert Federal Financial from a general partnership to a limited liability company named Federal Financial Partners LLC (Financial Partners), in order to facilitate the dissolution. See Defendants' Exhibit G, ¶ 1. All exhibit references in this memorandum of decision are to the exhibits appended to D & K's memorandum of law in support of its motion summary judgment (#122).

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recorded on August 2, 1999, with a maturity date of July 29, 2004. On April 1, 2010, Federal Financial was dissolved and converted to a limited liability company called Federal Financial Partners, LLC (Financial Partners). On July 7, 2020, Financial Partners assigned the D & K mortgage to the plaintiff, who recorded the assignment on the same date. The plaintiff alleges that it now owns the mortgage note and has the right to enforce payment of the outstanding balance. The plaintiff seeks foreclosure, a deficiency judgment, an appointment of a receiver to collect rents and profits, attorney's fees, costs, and damages.

On October 8, 2020, D & K filed an answer, special defenses and a counterclaim seeking discharge of the mortgage, damages, and attorney's fees and costs. The plaintiff filed a reply to the special defenses and counterclaim on March 8, 2021. On March 17, 2021, D & K filed a motion for summary judgment accompanied by a memorandum of law, two affidavits, and twenty-three supporting documents (#121). The defendant, Lincoln Holdings, joined D & K's motion for summary judgment by filing its own motion on April 19, 2021 (#123).<sup>3</sup> On April, 29, 2021, the plaintiff filed an extension of time to respond to the motions. On June 1, 2021, the plaintiff filed a memorandum in opposition to the defendants' motion along with two exhibits and an affidavit.

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<sup>3</sup> Lincoln Holdings filed a motion for summary judgment incorporating by reference the same arguments presented by D & K (#123). Therefore, all references to D & K's motion papers and arguments include those of Lincoln Holdings as well.

Oral argument on the motions was scheduled for Monday, June 21, 2021. On Friday, June 18, 2021, the last business day before the hearing, the plaintiff filed a supplemental affidavit in further support of its opposition memorandum. On the same date, D & K filed a motion to strike the supplemental affidavit arguing that it was untimely, unduly prejudicial, and a sham affidavit made in bad faith. The plaintiff filed an objection to the motion to strike on June 30, 2021.

I

MOTION TO STRIKE SUPPLEMENTAL AFFIDAVIT

D & K moved to strike the plaintiff's supplemental affidavit filed on June 17, 2021, on the grounds that it seeks to interject new evidence in an effort to create an issue of fact on the eve of oral argument without first seeking the permission of the court or the agreement of opposing counsel, thus depriving the defendants an opportunity to object to its submission in violation of Practice Book § 17-45 (a). "A motion for summary judgment shall be supported by appropriate documents, including but not limited to affidavits, certified transcripts of testimony under oath, disclosures, written admissions and other supporting documents." Practice Book § 17-45 (a). "Unless otherwise ordered by the judicial authority, any adverse party shall file and serve a response to the motion for summary judgment within forty-five days of the filing of the motion, including opposing affidavits and other available documentary evidence." Practice Book

§ 17-45 (b).

There is no question that the information contained in the supplemental affidavit was available to the plaintiff at the time it first filed its opposition to the motion for summary judgment on June 1, 2021. In fact, it is authored by the same affiant, Brian Donegan, general counsel of the plaintiff, as the previous affidavit filed by the plaintiff. Further, the supplemental affidavit extensively references Exhibit G, a document appended to D & K's original motion papers. Although Exhibit G was addressed by way of argument in the plaintiff's opposition memorandum, no evidence was offered concerning it either by way of affidavit or exhibit. In addition, no mention of Exhibit G was made in Donegan's original affidavit. As discussed later in this memorandum of decision, Exhibit G is a central piece of undisputed evidence upon which D & K relies extensively in making its case for summary judgment. For this reason, among others, the court finds that allowing the last minute supplemental affidavit, which offers a nuanced interpretation of Exhibit G, is unfair and extremely prejudicial to D & K's case for summary judgment.

Section 17-45 required, in the past, that opposing affidavits and other documentary evidence be filed not less than five days before the motion hearing. See *Magee Avenue, LLC v. Lima Ceramic Tile, LLC*, 183 Conn. App. 575, 585, 193 A.3d 700 (2018) (affidavit was untimely because it was filed one day before the hearing). "Our rules of practice require affidavits in

support of or in opposition to summary judgment motions to be filed before the motion is to be heard; and where an affidavit is not timely filed under the rules, the trial court does not abuse its discretion in refusing to consider it . . .” (Citation omitted; quotation marks omitted.) *Durkin Village Plainville, LLC v. Cunningham*, 97 Conn. App. 640, 656, 905 A.2d 1256 (2006). Also, it is contrary to standard practice to seek to introduce new evidence either by way of a reply memorandum or a last minute supplemental affidavit without the agreement of opposing counsel or the permission of the court.

In the present case, the defendant filed a motion for summary judgment on March 17, 2021. After a thirty-day extension of time, the plaintiff filed its opposition memorandum on June 1, 2021, seventy-five days after the motion was filed. The defendant filed a reply to the plaintiff’s opposition on June 17, 2021. The plaintiff then filed the supplemental affidavit at issue on June 18, 2021, ninety days after the motion for summary judgment was filed and seventeen days after filing its own objection to the motion. The supplemental affidavit was filed one business day before the motion hearing scheduled for Monday, June 21, 2021.

There is little doubt that the supplemental affidavit intends to create a new issue of fact in connection with a critical document that has been a focus of the motion for summary judgment since the outset.<sup>4</sup> Notably, until the supplemental affidavit was filed, the plaintiff had

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<sup>4</sup> In its reply brief and at oral argument, D & K asserts that the supplemental affidavit offers, for the first time, a justification or an excuse for the plaintiff’s long delay in failing to enforce the note and the mortgage, for which it previously failed to provide argument or evidence. D & K argues that, by way of the supplemental affidavit, the

offered no evidence to explain why it had not taken any action against the mortgaged property for almost sixteen years. Further, at oral argument, the plaintiff offered no reasonable explanation as to why it waited until the last business day before the scheduled argument to present this purportedly important evidence. Further, the supplemental affidavit does not present admissible evidence. Rather, it attempts to interpret key paragraphs of Exhibit G, the partnership dissolution agreement between Federal Financial Co., Federal Refinance Co., Inc. and the plaintiff, dated April 1, 2010, by reading into it information that is absent from plain language of the four corners of the document. Essentially, the plaintiff seeks to interject parol evidence into an agreement that until this point was treated as otherwise clear and unambiguous. See *Cruz v. Visual Perceptions, LLC*, 311 Conn. 93, 106, 84 A.3d 828 (2014) (“[w]hen contractual language is plain and unambiguous, to permit oral testimony, or prior or contemporaneous conversations, or circumstances . . . in order to learn what was intended, or to contradict what is written, would be dangerous and unjust in the extreme. (Internal quotation marks omitted.”); see also *Schilberg Integrated Metals Corp. v. Continental Casualty Co.*, 263 Conn. 245, 277, 819 A.2d 773 (2003) (parol evidence is inadmissible if offered solely to vary or contradict the written terms of an integrated and unambiguous contract). Because the supplemental affidavit seeks to contradict the plain language of Exhibit G and introduce the affiant’s interpretation of an otherwise clear and

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plaintiff is attempting to add facts about the circumstances underlying Exhibit G, in an effort to explain away the clear language of the document. D & K further argues that the supplemental affidavit is, in effect, a legal argument interpreting the plain meaning of the language in Exhibit G.

unambiguous document as fact, its contents are inadmissible.<sup>5</sup>

For the foregoing reasons, the court finds that the supplemental affidavit is unfair, untimely, cannot justifiably be considered by the court and should be stricken. See *Magee Avenue, LLC v. Lima Ceramic Tile, LLC*, supra, 183 Conn. App. 585 (“[W]e fail to see how the defendant here should have been permitted to file his initial affidavit in support of the motion one day before the hearing. The [party’s] affidavit therefore was untimely and should not have been considered by the trial court.”). Accordingly, the court hereby grants D & K’s motion to strike the plaintiff’s supplemental affidavit.

## II

### MOTION FOR SUMMARY JUDGMENT

“Summary judgment is a method of resolving litigation when pleadings, affidavits, and any other proof submitted 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 motion for summary judgment is designed to eliminate the delay and expense of litigating an issue when there is no real issue to be tried. . . . However, since litigants ordinarily have a constitutional right to have issues of fact decided by a jury . . . the moving party for summary judgment is held to a strict standard . . . of

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<sup>5</sup> Practice Book § 17-46 requires that “[s]upporting and opposing affidavits . . . be made on personal knowledge” and “shall set forth such facts as would be admissible in evidence . . . .”

demonstrating his entitlement to summary judgment.” (Citation omitted; footnote omitted; internal quotation marks omitted.) *Grenier v. Commissioner of Transportation*, 306 Conn. 523, 534-35, 51 A.3d 367 (2012). “[A]ny party may move for summary judgment upon any counterclaim or cross complaint as if it were an independent action. . . .” Practice Book § 17-44. “Practice Book (2014) § 17-44 was amended in 2013 to provide that summary judgment is available for defenses, which rendered prior decisional law to the contrary moot. W. Horton, et al., 1 Connecticut Practice Series: Connecticut Superior Court Civil Rules (2017–2018 Ed.) § 17–44, authors’ comments, p. 829.” *Nationstar Mortgage, LLC v. Mollo*, 180 Conn. App. 782, 791 n.12, 185 A.3d 643 (2018). “As the party moving for summary judgment, the [movant] is required to support its motion with supporting documentation, including affidavits.” *Heyman Associates No. 1 v. Ins. Co. of Pennsylvania*, 231 Conn. 756, 796, 653 A.2d 122 (1995). See Practice Book § 17-45.

“Once the moving party has met its burden . . . the opposing party must present evidence that demonstrates the existence of some disputed factual issue. . . .” *Fiano v. Old Saybrook Fire Co. No. 1, Inc.*, 332 Conn. 93, 101, 209 A.3d 629 (2019). “The existence of the genuine issue of material fact must be demonstrated by counteraffidavits and concrete evidence.” (Emphasis omitted; internal quotation marks omitted.) *Walker v. Dept. of Children & Families*, 146 Conn. App. 863, 870, 80 A.3d 94 (2013), cert. denied, 311 Conn. 917, 85 A.3d 653 (2014). “Mere



assertions of fact . . . are insufficient to establish the existence of a material fact and, therefore, cannot refute evidence properly presented to the court under Practice Book § [17–45].” (Internal quotation marks omitted.) *Marinos v. Poirot*, 308 Conn. 706, 712, 66 A.3d 860 (2013).

In support of its motion, D & K submitted twenty-five documents, including two affidavits (one from D & K’s owner and one from D & K’s counsel), the original mortgage deed and note dated July 29, 1999, the warranty deed from D & K to Lincoln Holdings dated May 15, 2020, a contract for services between D & K and CATICTrac, email correspondence between CATICTrac and the plaintiff, notices sent by Federal Financial to D & K in 2004, after the mortgage matured, Federal Financial’s dissolution agreement and assignment dated April 1, 2010, the assignment and bill of sale by Federal Refinance of its membership interest in Financial Partners to the plaintiff executed in 2010, a letter from D & K’s legal counsel to the plaintiff dated July 6, 2020, the assignment of the mortgage from Financial Partners to the plaintiff executed on July 7, 2020, the plaintiff’s notice of acceleration and foreclosure dated July 14, 2020, a copy of the plaintiff’s responses to D & K’s first set of interrogatories and requests for production, and a copy of the plaintiff’s supplemental compliance with D & K’s interrogatories and requests for production.

D & K argues that it is undisputed that the note and mortgage underlying this foreclosure action matured in 2004, and that the plaintiff, and its predecessors, took no action to enforce either in the fifteen plus years that followed or prior to the sale of the mortgaged property to

Lincoln Holdings in May 2020. Given this undisputed factual background, D & K seeks summary judgment as follows: (1) On the first count of its counterclaim, requesting the court to exercise its authority under General Statutes § 49-13 (a) (1) (A) to discharge a mortgage where the mortgagor has been in undisturbed possession for at least six years after the expiration of the time for performing the conditions of the mortgage and six years prior to the commencement of a petition for discharge; (2) On the second special defense that the plaintiff and its predecessors abandoned the mortgage; (3) On the third special defense that the plaintiff should be barred from enforcing the mortgage under the doctrine of laches.<sup>6</sup>

A

General Statutes § 49-13 (a) (1) (A)

“When the record title to real property is encumbered (1) by any undischarged mortgage, and (A) the mortgagor or those owning the mortgagor’s interest therein have been in undisturbed possession of the property for at least six years after the expiration of the time limited in the mortgage for the full performance of the conditions thereof, and for six years next preceding the commencement of any action under this section . . . the person owning the property, or the equity in the property, may bring a petition to the superior court for the judicial district in which the

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<sup>6</sup> The court agrees with D & K’s argument that although the question of payment creates an issue of fact should the foreclosure action proceed to a trial, it does not preclude summary judgment on the legal issues in connection with the undisputed issues of fact relative to the defendants’ motion, that is, whether the mortgage should be discharged pursuant to General Statutes § 49-13 (a) (1) (A); whether the mortgage has been abandoned; or whether the enforcement of the mortgage by way of the instant foreclosure action should be barred by the doctrine of laches.

property is situated, setting forth the facts and claiming a judgment as provided in this section . . . the phrase ‘time limited in the mortgage for the full performance of the conditions thereof’ clearly and unambiguously refers to the maturity date specified in the mortgage . . . .” (Citation omitted; emphasis omitted; quotation marks omitted.) *Fitzpatrick v. U.S. Bank National Assn.*, 173 Conn. App. 686, 692, 164 A.3d 832 (2017). “[Section] 49-13 (a) (1) (A) expressly authorizes the court to declare a mortgage invalid when *the mortgagor or those owning the mortgagor's interest* therein have been in undisturbed possession of the property for at least six years. . . .” (Emphasis in original; quotation marks omitted.) *Hall v. Kasper Associates*, 81 Conn. App. 808, 817, 846 A.2d 228 (2004).

## B

### Abandonment

“To constitute an abandonment there must be an intention to abandon or relinquish accompanied by some act or omission to act by which such intention is manifested. . . . While mere nonuse and lapse of time alone are not enough to constitute abandonment, they are competent evidence of an intent to abandon, and as such may be entitled to great weight when considered with other circumstances, and abandonment may be inferred from circumstances, such as failure by acts or otherwise to assert any claim to the right alleged to have been abandoned, or may be presumed from long continued neglect.” (Citations omitted.) *Glotzer v. Keyes*, 125 Conn. 227, 233, 5 A.2d 1 (1939). “Proof of abandonment by a defendant would be

inconsistent with any right in the plaintiff to exclusive possession of real property. . . .” *Mendez v. JPMorgan Chase Bank, N.A.*, Superior Court, judicial district of Hafford, Complex Litigation Docket, Docket No. X04-CV-14-6049524-S (January 8, 2016, *Sheridan, J.*).

### C

#### Laches

“The defense of laches, if proven, bars a plaintiff from [obtaining] equitable relief in a case in which there has been an inexcusable delay that has prejudiced the defendant. . . . First, there must have been a delay that was inexcusable, and, second, that delay must have prejudiced the defendant. . . .” *TD Bank, N.A. v. Doran*, 162 Conn. App. 460, 466, 131 A.3d 288 (2016).

Foreclosure proceedings are equitable in nature. Thus, the equitable defense of laches is a possible bar to foreclosure. *Id.*, 468. “Equity ordinarily will refuse a remedy when the statute applying to similar actions at law has run.” *Arnold v. Hollister*, 131 Conn. 34, 38, 37 A.2d 695 (1944).

D & K argues that the plaintiff abandoned the mortgage because after Federal Financial was dissolved in 2010, some assets, including the mortgage in question, remained in the newly formed limited liability company, Financial Partners. Financial Partners assigned the mortgage to the plaintiff on July 7, 2020, after ten years had passed, and only after D & K’s representative contacted the plaintiff. Thus, the D&K argues that the mortgage was abandoned because it was not transferred to the plaintiff after the partnership dissolution, for several years. D & K further

argues that neither the plaintiff nor any of any of its related entities acting on behalf of the plaintiff (e.g., Federal Financial or Financial Partners), made inquiries about the mortgage for a period of approximately sixteen years, and then only took action after D & K's representative contacted the plaintiff to request a release of the mortgage. Because of such delay, D & K maintains that it has been prevented from proving payment as witnesses and documents are not available. D & K also asserts that due to the long lapse between the maturity date and this foreclosure action, the accumulated interest became exorbitant and therefore, for these reasons, the defense of laches applies.

### III DISCUSSION

In ruling on a summary judgment, the court may consider not only the facts presented by the parties' affidavits and exhibits, but also the "inferences which could be reasonably and logically drawn from them . . . ." *United Oil Co. v. Urban Redevelopment Commission*, 158 Conn. 364, 381, 260 A.2d 596 (1969). The language in the mortgage deed states that "[a]ll sums owed under the Note are due no later than July 29, 2004." The mortgage note, dated July 29, 1999, also provides July 29, 2004, as the maturity date for the mortgage. The notices requesting a payoff for the mortgage were sent by Federal Financial in October 14, 2004, November 18, 2004, December 6, 2004 and July 14, 2020. The present foreclosure action was commenced on August 28, 2020.

On April 1, 2010, Federal Financial, the partnership between Federal Refinance and the plaintiff was dissolved. According to the terms of the agreement,<sup>7</sup> in order to facilitate the dissolution, the parties agreed to convert the entity originally known as Federal Financial Co. from a general partnership to a limited liability company named, Federal Financial Partners LLC (Financial Partners). The plaintiff also agreed to pay Federal Refinance for its membership interest in the LLC, Financial Partners, thus terminating their partnership.<sup>8</sup> Paragraph 3 of Exhibit G states: “*Certain assets of Federal Financial Co., will be transferred to Amos Financial LLC or its assigns and certain assets of Federal Financial Co. shall remain in the name of the limited liability company and abandoned.*” (Emphasis added.) Also included in Exhibit G, as paragraph 8, is an indemnity provision from Amos Financial LLC to Federal Refinance Co. (its former partner), agreeing to “indemnify, defend and hold Federal Refinance Co., Inc. harmless from any and all liability . . . in connection with the assets of Federal Financial Co. whether the assets are in the name of Federal Financial Co., Federal Financial Partners LLC [Financial Partners], Amos Financial LLC or some other third party assignee of Amos Financial LLC, except for four specified accounts, which included the D & K’s mortgage account.”<sup>9</sup> In its

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<sup>7</sup> This document is repeatedly referenced herein as Exhibit G.

<sup>8</sup> See Exhibit H.

<sup>9</sup> Paragraph 8 of Exhibit G specifically states that the plaintiff, Amos Financial LLC, “agrees to indemnify, defend, and hold Federal Refinance Co. harmless from any liability arising after April 30, 2010 . . . in connection with the assets of Federal Financial Co., Federal Financial Partners LLC, and Amos Financial . . . *except* for the following

supplemental compliance to D & K's interrogatories, the plaintiff discloses that it acquired the mortgage and note by way of an allonge to the note executed on July 7, 2020. An assignment of the mortgage from Financial Partners to Amos Financial LLC was also executed on July 7, 2020, and a notice of acceleration was sent to D & K on July 14, 2020. In response to D & K's first set of interrogatories and request for production, the plaintiff responded to an interrogatory asking how it "acquired any right or interest in the Mortgage and Note" as follows: "Plaintiff purchased the Note and Mortgage from Federal Financial Partners, LLC on or about April 30, 2010."

Exhibit F. In a subsequently filed supplemental compliance to the same interrogatory, however, the plaintiff responded as follows: "The allonge to the note was executed on July 7, 2020."

Exhibit W. A reasonable interpretation of this supplement to the plaintiff's original discovery compliance is an admission by the plaintiff that it had no legal interest in the note and mortgage between 2010 and 2020.

The undisputed evidence established by D & K indicates not only that the mortgage was abandoned, but also that D & K had been in undisturbed possession of the property located at 114 Broad Brook Street, Enfield, Connecticut, for approximately sixteen years, far longer than the period of six years required by the § 49-13. See *Fitzpatrick v. U.S. Bank National Assn.*, supra, 173 Conn. App. 686 (granting defendant's motion because he remained in undisturbed

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accounts: A. [redacted] . . . B. [redacted]. . . C.[redacted] . . . D. D&K Holdings, LLC., account No. RCI-91." (Emphasis added).

possession of the property for the statutory period of six years). In *Hall v. Kasper Associates*, supra, 81 Conn. App. 808, the Appellate Court affirmed the judgment of the lower court holding that § 49-13 authorizes the court to discharge a mortgage if the mortgagor has been in undisturbed possession of the property for a period of six years, regardless of whether the mortgagor was in personal possession six years before the action. The court accorded considerable weight to evidence that the mortgagee did not take any action to enforce the mortgage until the case arose. See *id.*, 817.

In the present case, the mortgage matured on July 19, 2004. Federal Financial made four attempts at communication with D & K through the end of 2004 in an effort to collect on its debt. After that, no effort was made by to enforce the note or the mortgage until counsel for the plaintiff sent a notice of acceleration, default and intent to foreclose on July 14, 2020. That notice was sent only after CATICTrac, D & K's representative, contacted the plaintiff on June 3, 2020, and D & K's attorney wrote to the plaintiff's general counsel in pursuit of a discharge of the mortgage pursuant to § 49-13. Section 49-13 authorizes the court to discharge a mortgage if "the mortgagor or those owning the mortgagor's interest therein have been in undisturbed possession of the property for at least six years after the expiration of the time limited in the mortgage for the full performance of the conditions thereof. . . ." General Statutes



§ 49-13.<sup>10</sup> As previously stated the expiration of the time limited in the mortgage for the full performance is the maturity date. See *Fitzpatrick v. U.S. Bank National Assn.*, supra, 173 Conn. App. 692 (“time limited in the mortgage for the full performance of the conditions . . . clearly and unambiguously refers to the maturity date specified in the mortgage.”). Therefore, D & K held undisturbed possession for more than six years, from the time the mortgage matured and an attempt to collect the debt was made, to the time D & K brought this counterclaim.

Based on the foregoing evidence, the court finds that it is undisputed that when Federal Financial was dissolved in 2010, the note and mortgage were not acquired by the plaintiff. Rather, on July 7, 2020, by way of an allonge to the note and an assignment of the mortgage, the plaintiff first acquired its right and interest to the note and mortgage. See Exhibits R and S. For the ten year period from 2010 to 2020, there was no activity concerning the note and mortgage by either Financial Partners, the plaintiff, or any other related entity with a legal interest. Considering all the circumstances, D & K was in undisturbed possession of the property secured

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<sup>10</sup> General Statutes § 49-13 provides, in part: “(a) When the record title to real property is encumbered (1) by any undischarged mortgage, and (A) the mortgagor or those owning the mortgagor's interest therein have been in undisturbed possession of the property for at least six years after the expiration of the time limited in the mortgage for the full performance of the conditions thereof, and for six years next preceding the commencement of any action under this section . . . the person owning the property, or the equity in the property, may bring a petition to the superior court for the judicial district in which the property is situated, setting forth the facts and claiming a judgment as provided in this section . . . (c) [s]uch notice having been given . . . the court may proceed to a hearing of the cause at such time as it deems proper, and, if no evidence is offered of any payment on account of the debt secured by the mortgage within a period set out in subsection (a) of this section, or of any other act within such a period as provided in said subsection (a) in recognition of its existence as a valid mortgage . . . the court may render a judgment reciting the facts and its findings in relation thereto and declaring the mortgage, foreclosure judgment . . . other lien invalid as a lien against the real estate. . . .” General Statutes § 49-13 (a) and (c).

by the mortgage for more than six years after the note matured on its due date of July 29, 2004. Further, the failure of Federal Financial, Financial Partners, the plaintiff, or any other related predecessor in interest of the plaintiff, to take action to either collect on the note or foreclose on the mortgage for over fifteen years, and not until D & K sold the property to Lincoln Holdings, constitutes undisputed evidence that the mortgage was abandoned.<sup>11</sup> See *Glotzer v. Keyes*, supra, 125 Conn. 233 (“abandonment may be inferred from circumstances, such as failure by acts or otherwise to assert any claim to the right alleged to have been abandoned, or may be presumed from long continued neglect.”). See also *Brierley v. Johnson*, 131 Conn. 675, 678, 42 A.2d 34 (1945) (“intention [to abandon] was accompanied by acts and conduct by which intention to abandon was made manifest.”). Finally, the plaintiff has produced no evidence that either it or any other successor to Federal Financial even attempted to communicate with D & K between 2004 and July 14, 2020, when counsel for the plaintiff sent a letter to D & K declaring it in default of the loan because it “failed to pay the required payment due on July 29, 2004, at the time the loan matured.” Exhibit T. Nor has the plaintiff come forward with any evidence of communications between it or its predecessors with any third parties concerning D & K during the relevant time period.

By way of the aforementioned evidence, D & K has met its initial burden of proof. The

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<sup>11</sup> There is no evidence that Federal Financial took any steps to enforce the mortgage after December 6, 2004.

burden thereafter shifted to the plaintiff to present evidence that creates a genuine disputed issue of fact. The court concludes that the plaintiff has produced no viable evidence to establish that the delay in asserting its claimed rights against the property was in any way excusable. Due to this unreasonable and unjustifiable delay identified by D & K, D & K's ability to defend this foreclosure action has been prejudiced by the destruction of documents in the normal course of business over time, the difficulty of locating readily available witnesses and its own bank documents related to the mortgage.<sup>12</sup> See *Dunham v. Dunham*, 204 Conn. 303, 326-27, 528 A.2d 1123 (1987), overruled on other grounds by *Santopietro v. City of New Haven*, 239 Conn. 207, 682 A.2d 106 (1996) (Defense of laches bars equitable relief when there has been unreasonable, inexcusable, and prejudicial delay). Further, D&K sold the property to Lincoln Holdings on May 15, 2020, exposing it to legal liability pursuant to the terms of the warranty deed.

Although by the time this action arose, the mortgaged property had been conveyed to Lincoln Holdings, § 49-13 does not require the petitioner to be in *personal* possession for the six years before the action is brought. See *Hall v. Kasper Associates*, supra, 81 Conn. App. 816 (“We conclude that tacking may be used to fulfill the six year time requirement of § 49–13.”). Therefore, D & K has established sufficient evidence to satisfy its burden of demonstrating that there is no genuine issue of material fact concerning its counterclaim seeking discharge of the

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<sup>12</sup> Apparent attempts by D & K to get documents from the plaintiff reflecting the identity of the D & K's banking institution in 2004 have been unsuccessful.

mortgage pursuant to § 49-13.

In support of its opposition to summary judgment, the only evidence submitted by the plaintiff was the following: 1) An affidavit written by the plaintiff's General Counsel Brian Donegan, stating that the plaintiff owns defendant's mortgage, it has not been paid in full, and that the principal amount owed is \$19,044.08; 2) records of D & K's account showing the loan payment history, the total amount owed, and when the last payment was received; 3) the mortgage note; and 4) a copy of the mortgage deed.

The plaintiff argues that it did not intend to abandon the mortgage because even though an assignment of the mortgage in question did not take place during the dissolution of Federal Financial, the mortgage was recorded, the recording was valid, and that the purpose of recording a mortgage is to allow the mortgage to remain on secured position. To further this argument, the plaintiff cites to the decision in *Independence One Mortgage Corp. v. Katsaros*, 43 Conn. App. 71, 681 A.2d 1005 (1996). In *Independence Mortgage Corp.*, the issue was whether the plaintiff had priority over the defendant's mortgage based on the doctrine of equitable subrogation. *Id.*, 72-73. There, following a foreclosure action, a dispute arose between two parties as to who was first in priority. *Id.* None of the issues in the case involved abandonment and this case does not involve a dispute over priority or an issue of equitable subrogation.

To further rebut D & K's claim of abandonment, the plaintiff relies in part on the Appellate Court decision in *R.F. Daddario & Sons, Inc. v. Shelansky*, 123 Conn. App. 725, 3

A.3d 957 (2010). In *R.F. Daddario & Sons, Inc.*, the defendants claimed that the mortgage was abandoned because the plaintiff did nothing to enforce the mortgage for seventeen years. *Id.*, 736. The plaintiff offered evidence showing that after the mortgage matured in 1993 the plaintiff did not only send notices, but he also brought an action against the defendants in 1997 to collect the amount owed under the mortgage note. In addition, the plaintiff in that case provided affidavits of two witnesses attesting to the fact that settlement proposals were exchanged between the parties' attorneys in 2004, four years before the lawsuit commenced. *Id.* Moreover, the plaintiff provided further evidence showing that he believed that, at that time, the property had no equity to justify the expenses associated with a foreclosure action and that he knew that the defendants were planning to sell the condominium at issue. *Id.*, 737. The Appellate Court affirmed the judgment of the lower court regarding the issue of abandonment concluding that the plaintiff did not intentionally abandon its rights under mortgage. *Id.*

The plaintiff's reliance on *R.F. Daddario & Sons, Inc.* is inapposite. First, the mortgage in the present case matured in July 2004, and all of the notices sent by Federal Financial to D & K were sent during that same year. The last notice sent was on December 6, 2004. From December 6, 2004 to July 14, 2020, the date of the plaintiff's notice of acceleration and foreclosure, more than fifteen years had passed without any attempt whatsoever to enforce the mortgage either by the plaintiff, Federal Financial or Financial Partners. By contrast, the plaintiff in *R.F. Daddario & Sons, Inc.*, attempted to collect the debt by sending notices, bringing a

foreclosure action, and engaging in settlement proposals during a fifteen-year period. Also, the court affirmed the holding of the trial court based on evidence that included a showing that the plaintiff “knew the defendants had moved out, would eventually sell the property, and the plaintiff would be paid.” *R.F. Daddario & Sons, Inc. v. Shelansky*, supra, 123 Conn 736. In the present case, the record is devoid of any indication that the plaintiff, or its predecessors, attempted to contact D & K until after D & K’s agent contacted the plaintiff in 2020 and D & K’s attorney wrote to the plaintiff’s general counsel on July 6, 2020. Thereafter, on July 7, 2020, Financial Partners assigned D & K’s note and mortgage to the plaintiff, and on July 14, 2020, the plaintiff sent a notice of acceleration and foreclosure to D & K.

In a last ditch effort to negate D & K’s claim of abandonment, the plaintiff relies substantially on Exhibit G, the dissolution agreement of Federal Financial, and specifically paragraph 8, as somehow reflective of an intent by the plaintiff to take over all aspects of the Federal Financial’s active business, including an intent to purchase D & K’s mortgage. Paragraph 8, however, as previously addressed, is an indemnity provision that excludes the D & K mortgage from its coverage. Specifically, paragraph 8 provides that “Amos Financial LLC agrees to indemnify, defend, and hold Federal Refinance Co. [its former partner], harmless from any liability arising after April 30, 2010 . . . in connection with the assets of Federal Financial Co., Federal Financial Partners, Amos Financial . . . *except* for the following accounts: [A]. . . . [B]. . . . [C]. . . . D. D&K Holdings, LLC, account No. RCI-91.” (Emphasis added.)” Thus,

contrary to the plaintiff's argument, a more reasonable interpretation of paragraph 8, particularly when read together with the remainder of the agreement,<sup>13</sup> reflects an intent to exclude the D & K mortgage from its pledge of indemnity to the other entities in an effort to avoid any exposure to liability arising out of the D & K's mortgage. Additionally, the lack of an assignment of the D & K note and mortgage to the plaintiff, for a period of ten years (from 2010 to 2020), along with the failure of the plaintiff and its predecessors to take any action to enforce the debt for close to sixteen years, far more persuasively reveals an intent to abandon the mortgage. See *Brierley v. Johnson*, supra, 131 Conn. 678 ("intention [to abandon] was accompanied by acts and conduct by which intention to abandon was made manifest."). It is also telling that from April 1, 2010 to July 7, 2020, all the documents in evidence reflect ownership of the note and mortgage remained in the name of entities other than Amos Financial LLC, and thereby contradict the plaintiff's claim that somehow Exhibit G reflects an actual intent by the plaintiff to purchase the D & K loan. See Exhibits, R, S and W.

### CONCLUSION

Based on all the evidence presented and the arguments of counsel, the court finds that the plaintiff has failed to demonstrate that there is a legitimate issue of material fact regarding D & K's entitlement to summary judgment as to its counterclaim seeking discharge of the mortgage pursuant to § 49-13, or its special defenses of abandonment or laches. Accordingly, for all the foregoing reasons, D & K's motion to strike the plaintiff's supplemental affidavit is hereby

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<sup>13</sup> Specifically, paragraph 3 of Exhibit G which reads as follows: "Certain assets of Federal Financial Co. will be transferred to Amos Financial LLC or its assigns and certain assets of Federal Financial Co. shall remain in the limited liability company and abandoned."

granted. D & K's motion for summary judgment as to the first count of its counterclaim seeking discharge of its mortgage pursuant to General Statutes § 49-13 (a) (1)(A) is hereby granted. Finally, the defendants' motions for summary judgment as to their second and third special defenses, abandonment and laches, respectively, are also granted.

BY THE COURT,

  
\_\_\_\_\_  
PECK JTR



**CHECKLIST FOR CLERK**

Docket Number CV 20-6132325-5

Case Name Amos Financial LLC v.  
DEK Holding Co, LLC, Et al

Memorandum of Decision dated 11-9-21

File Sealed:            yes \_\_\_\_\_ no X

Memo Sealed:        yes \_\_\_\_\_ no X

This memorandum of Decision may be released to the Reporter of  
Judicial Decisions for publication. X

This Memorandum of Decision may NOT be released to the  
Reporter of Judicial Decisions for publication. \_\_\_\_\_



# State of Connecticut Judicial Branch Superior Court Case Look-up



Superior Court Case Look-up  
Civil/Family  
Housing  
Small Claims

☞ **HHD-CV20-6132325-S AMOS FINANCIAL LLC v. D & K HOLDING COMPANY LLC Et Al**  
**Prefix/Suffix:** [none]    **Case Type:** P00    **File Date:** 09/08/2020    **Return Date:** 09/22/2020  
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By Court Location  
By Attorney/Firm Juris Number  
Motion to Seal or Close  
Calendar Notices

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Information Updated as of: 11/09/2021

Case Information
<b>Case Type:</b> P00 - Property - Foreclosure <b>Court Location:</b> HARTFORD JD <b>Property Address:</b> 114 Broad Brook, Enfield, CT 06082 <b>List Type:</b> No List Type <b>Trial List Claim:</b> <b>Last Action Date:</b> 10/14/2021 (The "last action date" is the date the information was entered in the system)

Disposition Information
<b>Disposition Date:</b> <b>Disposition:</b> <b>Judge or Magistrate:</b>

Party & Appearance Information
--------------------------------

Party	No Fee Party	Category
<b>P-01 AMOS FINANCIAL LLC</b> Attorney: ☞ HALLORAN & SAGE LLP (026105) ONE GOODWIN SQUARE 225 ASYLUM STREET HARTFORD, CT 06103 File Date: 09/08/2020		Plaintiff
<b>D-01 D &amp; K HOLDING COMPANY LLC</b> Attorney: ☞ MCELROY DEUTSCH MULVANEY & CARPENTER/PH (101812) ONE STATE STREET 14TH FLOOR HARTFORD, CT 061033102 File Date: 09/23/2020		Defendant
<b>D-02 LINCOLN HOLDINGS LLC</b> Attorney: ☞ HOOPES MORGANTHALER RAUSCH & SCARAMOZZA (423839) 185 ASYLUM STREET CITYPLACE II 15TH FLOOR HARTFORD, CT 06103 File Date: 10/19/2020		Defendant
<b>D-03 360 FEDERAL CREDIT UNION</b> Non-Appearing		Defendant

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If there is an ☞ in front of the docket number at the top of this page, then the file is electronic (paperless).

- Documents, court orders and judicial notices in electronic (paperless) civil, housing and small claims cases with a return date on or after January 1, 2014 are available publicly over the internet.\* For more information on what you can view in all cases, view the [Electronic Access to Court Documents Quick Card](#).
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- Documents, court orders and judicial notices in an electronic (paperless) file can be viewed at any judicial district courthouse during normal business hours.\*
- Pleadings or other documents that are not electronic (paperless) can be viewed only during normal business hours at the Clerk's Office in the Judicial District where the case is located.\*
- An Affidavit of Debt is not available publicly over the internet on small claims cases filed before October 16, 2017.\*

\*Any documents protected by law Or by court order that are Not open to the public cannot be viewed by the public online And can only be viewed in person at the clerk's office where the file is located by those authorized by law or court order to see them.

Motions / Pleadings / Documents / Case Status				
Entry No	File Date	Filed By	Description	Arguable
	09/08/2020	P	<a href="#">SUMMONS</a> ☞	
	09/08/2020	P	<a href="#">COMPLAINT</a> ☞	