

DA 18-0630

IN THE SUPREME COURT OF THE STATE OF MONTANA

2019 MT 226

CHELCEE GRAHAM-ROGERS,

Plaintiff and Appellant,

v.

WELLS FARGO BANK, N.A.,

Defendant and Appellee.

APPEAL FROM: District Court of the Eighteenth Judicial District,
In and For the County of Gallatin, Cause No. DV 16-571B
Honorable Rienne H. McElyea, Presiding Judge

COUNSEL OF RECORD:

For Appellant:

Brian J. Miller, Robert Farris-Olsen, Morrison Sherwood Wilson & Deola,
PLLP, Helena, Montana

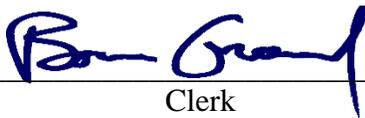
For Appellee:

Kenneth K. Lay, Brett Clark, Crowley Fleck PLLP, Helena, Montana

Submitted on Briefs: September 18, 2019

Decided: September 24, 2019

Filed:


Clerk

Justice Jim Rice delivered the Opinion of the Court.

¶1 Chelcee Graham-Rogers (Graham-Rogers), appeals from the entry of summary judgment on her claims in favor of Wells Fargo Bank, N.A. (Wells Fargo), by the Eighteenth Judicial District Court, Gallatin County. We affirm, and restate the issues as follows:

1. *Did the District Court err by dismissing Graham-Rogers' breach of contract claim?*
2. *Did the District Court err by dismissing Graham-Rogers' tort claims?*

FACTUAL AND PROCEDURAL BACKGROUND

¶2 In 2005, Graham-Rogers jointly owned an 11.331-acre tract (Lot 3) in Gallatin County, along with her mother, grandmother, and two siblings. Graham-Rogers and the other owners designated a 1-acre portion of Lot 3 as collateral for mortgage purposes (Tract M) and had a mortgage tract survey recorded to reflect this designation. On February 14, 2006, Graham-Rogers obtained a loan from Valley Bank of Belgrade for \$125,042. Graham-Rogers and her family members who jointly owned Lot 3 executed a deed of trust with Valley Bank of Belgrade as beneficiary, with Tract M serving as collateral for the loan. After the loan's origination, Wells Fargo assumed service of the loan.

¶3 On November 19, 2008, Graham-Rogers and her then-husband refinanced the February 14, 2006 loan with Wells Fargo, borrowing \$182,849 dollars (the Loan). Graham-Rogers executed a Deed of Trust to secure the Loan, which named Wells Fargo

as beneficiary. Tract M served as the collateral for the Loan and is referred to as the “Property” in the Deed of Trust.

¶4 For reasons that are not evident from the record, when Tract M was created for mortgage purposes, the Department of Revenue assigned the tract its own tax identification number, REF 54165, separate from the tax identification number for Lot 3, REF 32145. Between 2006 and 2008, property taxes were separately assessed for Tract M. Sometime in 2009, the Department of Revenue deactivated the tax identification number for Tract M. The District Court found, upon the uncontested affidavit submitted by an employee of the Department of Revenue, that the Department does not ordinarily assign new tax identification numbers for mortgage survey parcels. Since 2008, the Department has assessed real property taxes on Lot 3 and Tract M together, as an individual tax parcel, referred to as tax identification number REF 32145.¹

¶5 Under the Deed of Trust, Graham-Rogers was responsible for paying, “in each monthly payment, together with principal and interest as set forth in the Note and any late charges, a sum for (a) taxes and special assessments levied or to be levied against the Property” In the event Graham-Rogers failed to make required payments, Wells Fargo was authorized to do “whatever is necessary to protect the value of the Property and

¹ The District Court further explained that the creation of Tract M for mortgage purposes was exempted from the Montana Subdivision and Platting Act (MSPA), which exempts divisions of land that are “created to provide security for mortgages, liens, or trust indentures for the purpose of construction, improvements to the land being divided, or refinancing purposes.” Section 76-3-201(1)(b), MCA; *see also* § 76-3-201(3), MCA.

Lender's rights in the Property, including payment of taxes" The Deed of Trust further specified that any amount paid by Wells Fargo to protect the value of the Property "shall become an additional debt of the Borrower and be secured by this Security Instrument."

¶6 Graham-Rogers and her family members who jointly owned Lot 3 failed to pay the 2009 and 2010 property taxes assessed to Lot 3, which included Tract M. In October 2010, Graham-Rogers received a real estate tax bill from Gallatin County which stated, "WARNING! This property is the subject of a TAX LIEN SALE per MCA 15-17-212. Please pay TOTAL DELINQUENT TAXES DUE immediately." Graham-Rogers sought to refinance the Loan with Wells Fargo in late 2010 and early 2011. In February 2011, upon learning of the tax delinquency and pending tax lien sale of the property, Wells Fargo advanced \$3,387.76 to pay the delinquent taxes because there were insufficient funds in Graham-Rogers' escrow account to pay the full amount of taxes due. The advance created a negative balance in Graham-Rogers' escrow account. Wells Fargo notified Graham-Rogers of its full tax payment, the resulting escrow shortage, and a change in her monthly mortgage payment to make up the shortage in her escrow account.

¶7 Graham-Rogers objected to Wells Fargo's full tax payment for Lot 3 and the increase of her mortgage payment to cover the tax payment. Graham-Rogers continued to pay the original loan payment amount, which reflected the taxes and costs associated only with Tract M. Graham-Rogers and Wells Fargo attempted to resolve this payment issue in 2011, with Wells Fargo offering repayment options, but an agreement was not reached.

Wells Fargo maintained the Deed of Trust permitted it to pay the taxes in full and increase Graham-Rogers' monthly mortgage payment accordingly, and that Graham-Rogers' partial payments did not satisfy the terms of the note and Deed of Trust. Payments have not been made on the loan as due since July 2013.

¶8 On August 7, 2011, Wells Fargo sent Graham-Rogers a letter stating the Loan was in default and that Wells Fargo would pursue foreclosure if the Loan was not made current. In October 2013, Graham-Rogers quitclaimed her interest in Lot 3 to her family, and Wells Fargo initiated foreclosure proceedings in December 2013. Graham-Rogers pursued several other avenues in search of relief, including filing a complaint against Wells Fargo with the Office of Comptroller of Currency, and initiating a bankruptcy proceeding in 2014.

¶9 Internal Wells Fargo emails indicated that some employees believed Wells Fargo had paid the property taxes on the wrong parcel and should only have paid the taxes on Tract M. In March 2016, Wells Fargo sent Graham-Rogers a letter stating it had made an error by paying taxes on the entirety of Lot 3 because Lot 3 was not encumbered by Graham-Rogers' mortgage. Accordingly, Wells Fargo discontinued paying taxes on Lot 3 and refunded the \$3,387.76 that had been added to Graham-Rogers loan as a result of paying the taxes. Wells Fargo also gave Graham-Rogers an additional \$500 as a good will gesture.

¶10 Graham-Rogers filed this action in July 2016, alleging claims for breach of contract, negligence, negligent misrepresentation, violations of the Montana Consumer Protection Act, and punitive damages. Wells Fargo moved for summary judgment and, in separate

orders, the District Court granted summary judgment in favor of Wells Fargo on all of Graham-Rogers' contract and tort claims, reasoning that the Deed of Trust's unambiguous language permitted Wells Fargo to pay Lot 3's taxes in full, that this action was necessary to protect their interest in Graham-Rogers' property, and thus, no breach of contract occurred. The District Court concluded that the March 2016 letter to Graham-Rogers stating Wells Fargo had erred in paying the taxes on Lot 3 was incorrect as a matter of law, as Wells Fargo was authorized to do so under the unambiguous terms of the Deed of Trust. Further, because Graham-Rogers' tort claims were based on the breach of contract claim, and no breach of the Deed of Trust had occurred, the tort claims had no basis in law. The District Court held that the tort claims were additionally subject to dismissal on other grounds.

¶11 Graham-Rogers appeals.

STANDARD OF REVIEW

¶12 “We review de novo a district court's grant or denial of summary judgment, applying the same criteria as the district courts.” *Modroo v. Nationwide Mut. Fire Ins. Co.*, 2008 MT 275, ¶ 19, 345 Mont. 262, 191 P.3d 389 (citation omitted). “Summary judgment is appropriate ‘if the pleadings, depositions, answers to interrogatories, and admissions on file,’ together with any affidavits demonstrate that no genuine issue exists as to any material fact and that the party moving for summary judgment is entitled to judgment as a matter of law.” *Modroo*, ¶ 19 (citing M. R. Civ. P. 56(c)). “We view the evidence in the light most

favorable to the party opposing summary judgment, and we draw all reasonable inferences in favor of the party opposing summary judgment.” *Modroo*, ¶ 19.

DISCUSSION

¶13 1. *Did the District Court err by dismissing Graham-Rogers’ breach of contract claim?*

¶14 Graham-Rogers argues summary judgment was improperly entered because there were issues of material fact in dispute, specifically, whether Wells Fargo breached the Deed of Trust by paying Graham-Rogers’ delinquent taxes and increasing the escrow portion of her mortgage payment to cover the amounts Wells Fargo had advanced; whether Wells Fargo’s actions were necessary to protect its interest in Graham-Rogers’ property; and whether Wells Fargo negligently serviced Graham-Rogers’ Loan. Wells Fargo answers that the District Court correctly granted summary judgment because, as a matter of law, paying Graham-Rogers delinquent taxes was the only way to protect its interest in the property, the payment was authorized under the unambiguous terms of the Deed of Trust, and Wells Fargo owed no special duty to Graham-Rogers that would have prevented it from taking this action.

¶15 A party moving for summary judgment “has the burden of establishing a complete absence of any genuine factual issues. In light of the pleadings and the evidence before the court, there must be no material issue of fact remaining which would entitle a nonmoving party to recover. Once the moving party has met its burden, the opposing party must present material and substantial evidence, rather than mere conclusory or speculative

statements, to raise a genuine issue of material fact. Disputed facts are material if they involve the elements of the cause of action or defense at issue to an extent that necessitates resolution of the issue by a trier of fact.” *Motarie v. N. Mont. Joint Refuse Disposal Dist.*, 274 Mont. 239, 242, 907 P.2d 154, 156 (1995) (internal citations omitted). As the non-moving party, Graham-Rogers’ burden was to “present material and substantial evidence, rather than mere conclusory or speculative statements, to raise a genuine issue of material fact.” *Motarie*, 274 Mont. at 242, 907 P.2d at 156. “Conclusory statements do not suffice to raise a genuine issue of material fact.” *Reeves v. U.S. Bank Nat’l Ass’n*, 2017 MT 70, ¶ 10, 387 Mont. 138, 391 P.3d 742.

¶16 In support of her argument that disputed material facts remained as to whether Wells Fargo’s actions breached the Deed of Trust and were “necessary,” Graham-Rogers argues Wells Fargo admitted to breaching the Deed of Trust when, after paying the taxes on Lot 3 and adding them to Graham-Rogers’ debt, it discontinued escrow and tax collection altogether.

¶17 Deeds of trust are interpreted according to general contract principles. *Reeves*, ¶ 16. Contract interpretation is a question of law. *Ferdig Oil Co. v. ROC Gathering, LLP*, 2018 MT 307, ¶ 12, 393 Mont. 500, 432 P.3d 118. “The language of a contract governs its interpretation if the language is clear and unambiguous,” *Reeves*, ¶ 16 (internal quotations and citation omitted); *see also* § 28-3-401, MCA, and “the duty of the court is to apply the language as written.” *Carelli v. Hall*, 279 Mont. 202, 209, 926 P.2d 756, 761 (1996). “The rules of contract interpretation require courts to give effect to the mutual intentions of the

parties, based, if possible, solely on the provisions of the contract.” *San Diego Gas & Elec. Co. v. Ninth Judicial Dist. Ct.*, 2014 MT 191, ¶ 20, 375 Mont. 517, 329 P.3d 1264.

¶18 We agree with the District Court’s conclusion that the Deed of Trust is clear and unambiguous and must be applied as written. By its plain terms, Graham-Rogers was required to pay, “in each monthly payment, together with principal and interest as set forth in the Note and any late charges, a sum for (a) taxes and special assessments levied or to be levied against the Property” After property taxes were no longer separately assessed against Tract M due to the Department of Revenue’s deactivation of Tract M’s tax identification number, taxes were assessed against Lot 3, including Tract M. As the District Court noted, “when Lot 3 became subject to a tax lien sale, Tract M, being a part of Lot 3, was also subject to the tax lien sale.” Thus, when the taxes were not paid as required by the Deed of Trust, Wells Fargo was expressly authorized to pay the total tax amount and increase Graham-Rogers’ mortgage payment to reflect the additional debt owed to Wells Fargo. As the Deed of Trust states:

If the Borrower fails to make . . . the payments required by paragraph 2, or fails to perform any other covenants and agreements contained in this Security Instrument, or there is a legal proceeding that may significantly affect Lender’s rights in the Property . . . then *Lender may do and pay whatever is necessary to protect the value of the Property and Lender’s rights in the Property, including payment of taxes, hazard insurance, and other items mentioned in paragraph 2. Any amounts disbursed by Lender under this paragraph shall become an additional debt of the Borrower and be secured by this Security Instrument.* These amounts shall bear interest from the date of the disbursement, at the Note rate, and at the option of Lender, shall be immediately due and payable.

(Emphasis added.) According to the clear and unambiguous language in the Deed of Trust, Wells Fargo acted within its rights and did not breach the Deed of Trust by paying the total delinquent taxes on Lot 3. To be sure, there was confusion generated from the tax authorities about the assessment of Tract M, and Wells Fargo was not consistent in its response to the confusion during the years it serviced the account. However, there is no question that the pending tax sale threatened to deprive Wells Fargo of its interest in the property, and that it was authorized to take action under the Deed of Trust.

¶19 The District Court concluded that Tract M should not have been classified as a separate parcel for ownership or taxation purposes, and that Graham-Rogers “was never entitled to have Tract M taxed separately to her,” citing §§ 76-3-201(3), 15-8-307, MCA, and *Kneedler v. League Wide, Inc.*, 1999 MT 80, ¶ 14, 294 Mont. 101, 979 P.2d 163. Graham-Rogers argues this conclusion was in error, because only Tract M was made collateral for the loan, Graham-Rogers was entitled to have it treated separately for taxes, and that “Tract M would become a separate property of land (held by Wells Fargo) if it was ever foreclosed upon.” However, we need not address the tax assessment question to resolve the issues presented here. While Graham-Rogers is correct that Wells Fargo could only foreclose upon Tract M, no distinction had been made in the taxation of Lot 3 and Tract M since 2008, when the Department of Revenue eliminated Tract M’s separate tax identity. Graham-Rogers contends that consolidation of the tax bill was error, but, nonetheless, initiation of the tax lien sale of Lot 3 necessarily implicated Wells Fargo’s

secured interest in Tract M. As Wells Fargo notes, any problem over proper assessment of Tract M was an issue between Graham-Rogers and the taxing authorities.

¶20 Graham-Rogers argues Wells Fargo's actions constituted a breach because the Deed of Trust authorizes it to act only if there is a "legal proceeding" that may significantly affect its interest in the property, that a tax lien sale is not a "legal proceeding," citing our description of a tax lien sale as a "tax collection device" in *RN & DB, LLC v. Stewart*, 2015 MT 327, ¶ 28, 381 Mont. 429, 362 P.3d 61, and noting this phrase is not defined within the Deed of Trust. Wells Fargo responds that the Deed of Trust further describes a "legal proceeding" as "a proceeding in bankruptcy, for condemnation or to enforce laws or regulations," which it argues encompasses tax deed procedures.

¶21 The Deed of Trust's authorization for the lender to do "whatever is necessary to protect the value of the Property and Lender's rights in the Property, including the payment of taxes" in response to a "legal proceeding," necessarily contemplates the initiation of a tax lien procedure against the secured property by the taxing authorities. Faced with a procedure to enforce laws and regulations that can lead to "the ultimate sanction of losing title to the property," *RN & DB, LLC*, ¶ 29, Wells Fargo was authorized to act to pay the taxes and bring the tax lien procedure to a close.

¶22 Graham-Rogers also argues there is a dispute of material fact regarding whether Wells Fargo's actions were "necessary" to protect its interest in her property. As noted above, although the Deed of Trust did not grant a security interest in the entirety of Lot 3, Wells Fargo's collateral—Tract M—was part of Lot 3, and thus became subject to a tax

lien sale when the entirety of Lot 3 was subjected to the sale. The Deed of Trust defined “necessary” to include the payment of taxes to protect the Bank’s interest in the property. While it may have been technically possible for the Bank to pursue other, multi-lateral, options, such as negotiation of an alternate tax payment arrangement with Graham-Rogers and her relatives, or seeking relief from the tax deed process from the County, such options were clearly uncertain and extra-contractual. Under the Deed of Trust as written, the Bank’s unilateral action in response to the jeopardy posed to its interest was contractually defined as “necessary,” contractually authorized, and was not a breach of the contract. Consequently, we cannot conclude, under the Deed of Trust and these facts, that a genuine issue of material fact existed regarding the necessity of Wells Fargo’s actions. Under these circumstances, the District Court correctly granted summary judgment in favor of Wells Fargo on the breach of contract claim.

¶23 2. *Did the District Court err by dismissing Graham-Rogers’ tort claims?*

¶24 Graham-Rogers’ additional claims—negligence, negligent representation, and violation of the Consumer Protection Act—are premised upon her claim that Wells Fargo breached the contract by paying the delinquent taxes on Lot 3 and requiring her to repay those taxes. Graham-Rogers asserts Wells Fargo thereby breached a duty to her and negligently serviced her loan.

¶25 To prevail in an action for negligence, a plaintiff must demonstrate “a duty, breach of that duty, causation, and damages.” *Morrow v. Bank of Am., N.A.*, 2014 MT 117, ¶ 33, 375 Mont. 38, 324 P.3d 1167 (citation omitted). “The existence of a duty is a question of

law for determination by the court Once a duty has been established, the breach of that duty is a question of fact to be resolved by a jury.” *Morrow*, ¶ 33 (citations omitted). Generally, “a bank has no duty to modify or renegotiate a defaulted loan.” *Morrow*, ¶ 34 (citation omitted). Moreover, the relationship between a bank and its customer generally does not give rise to a fiduciary duty; rather, it is usually “described as that of a debtor and creditor.” *Morrow*, ¶ 34 (quoting *Deist v. Wachholz*, 208 Mont. 207, 216, 678 P.2d 188, 193 (1984) (internal citation omitted)). “However, where a bank goes beyond the ordinary role of a lender of money and actively advises customers in the conduct of their affairs, the bank may owe a fiduciary duty.” *Morrow*, ¶ 34 (citation omitted).

¶26 Graham-Rogers’ tort claims against Wells Fargo are grounded in the parties’ rights and responsibilities under the Deed of Trust. As the District Court noted, Graham-Rogers has not alleged that Wells Fargo violated any duty it would have owed to Graham-Rogers in the absence of the Deed of Trust. Further, the relationship between Wells Fargo and Graham-Rogers as one of bank and customer did not give rise to an additional fiduciary duty in these circumstances. *See Morrow*, ¶ 34.

¶27 Having determined Wells Fargo did not breach the Deed of Trust, it likewise did not violate a duty owed to Graham-Rogers under the Deed of Trust. Wells Fargo had no contractual duty to accept Graham-Rogers’ partial payments in satisfaction of her increased monthly mortgage payment or attempt to satisfy the tax payment by entering into agreements with the co-owners of Lot 3, as Graham-Rogers suggests. *See Reeves*, ¶¶ 17-18 (“Nothing less than full performance discharges a duty” under a deed of trust (citing

Restatement (Second) of Contracts § 235 cmt. a)). As such, Graham-Rogers’ negligence, negligent misrepresentation, and Consumer Protection Act claims present no genuine issue of material fact, and the District Court correctly granted summary judgment in favor of Wells Fargo on these claims.

¶28 Affirmed.

/S/ JIM RICE

We concur:

/S/ MIKE McGRATH
/S/ DIRK M. SANDEFUR
/S/ BETH BAKER

Justice Ingrid Gustafson, dissenting.

¶29 I dissent from the majority’s affirmation of the District Court’s grant of summary judgment. I believe the District Court erred in granting summary judgment to Wells Fargo, because whether it was “necessary” under the contract for Wells Fargo to pay the taxes for all of Lot 3 to protect its interest in Tract M is a question of fact that should have gone to the jury.

¶30 The Court ignores the unique facts of this case that create a genuine issue of fact. Graham-Rogers and her family jointly owned 11.331 acres of property known as Lot 3. In 2006, the family signed a Deed of Trust creating the one-acre Tract M out of Lot 3 to provide security for a mortgage for Graham-Rogers’ manufactured home. Tract M was

divided from Lot 3 under § 76-3-201, MCA, for mortgage purposes and did not transfer the jointly owned property to Graham-Rogers individually. The Department of Revenue, however, created a separate tax identification number for Tract M and taxed it separately from 2006 to 2008. Graham-Rogers and her family understood that Tract M belonged to Graham-Rogers and she was responsible for the mortgage and taxes on it. Graham-Rogers dutifully made her mortgage payments, including the taxes due for the one acre.

¶31 Wells Fargo took over service of the mortgage. Wells Fargo failed to timely pay property taxes on Tract M in 2006 and 2007. Graham-Rogers contacted them in 2007 and 2008, respectively, to fix the problem and Wells Fargo assured her the issue was resolved. In 2008, Graham-Rogers refinanced her loan. It appears that when Wells Fargo filed the refinancing paperwork with the county in 2008, the Department of Revenue discovered Tract M should not have been issued a separate tax identification number in 2006 and deactivated the individual identification without notifying the parties. The Department resumed taxing Tract M as part of Lot 3. Taxes on Lot 3 went unpaid in 2009 and 2010. The record does not provide any insight into why the taxes were not paid in 2009 and 2010.

¶32 Graham-Rogers looked into refinancing her loan again in 2011. In the course of investigating the refinance, Wells Fargo discovered that the 2009 and 2010 property taxes on the entire 11.331 acres of Lot 3 had gone unpaid and a tax lien sale was pending on Lot 3, including Tract M. The amount of money in Graham-Rogers's escrow account was insufficient to pay the entire tax bill. Wells Fargo proceeded to pay the delinquent taxes on all of Lot 3 and added that amount to Graham-Rogers's loan. There is no evidence in

the record that Wells Fargo requested Graham-Rogers to settle the tax situation before paying the taxes in full and adding them to Graham-Rogers's existing mortgage or that Graham-Rogers refused to resolve the tax issue before Wells Fargo acted. Wells Fargo increased Graham-Rogers's monthly payment by over two hundred dollars per month to pay for the escrow account shortage. Up until this time, Graham-Rogers was current on all payments laid out in the Note or Deed of Trust.

¶33 Graham-Rogers immediately protested Wells Fargo's payment of the taxes on all of Lot 3. Graham-Rogers's submitted evidence of e-mails she wrote to Wells Fargo suggesting multiple remedies after the fact. In July 2011, Graham-Rogers wrote to Wells Fargo Branch Manager Ken Krantz that she inquired with the Gallatin County Treasurer's Office about resolving the issue. She learned Tract M had not been deeded in a way to tax it separately from the rest of Lot 3. The county told her the discrepancy was found in 2008 when Wells Fargo filed refinance paperwork and the separate tax identification number was deactivated. Graham-Rogers suggested the property should be deeded to her individually to resolve the issue. In response, Krantz brushed her off and wrote back, "We pay the tax bills that the county prepares[.] Until the county prepares a different tax bill nothing can be done[.]" Graham-Rogers also wrote to Wells Fargo suggesting her mother would take over responsibility for the unpaid taxes through a personal loan. This too went nowhere.

¶34 Throughout this time, Wells Fargo internal e-mails showed confusion within Wells Fargo whether taxes on Lot 3 were properly paid. In fact, Wells Fargo admitted it made a

mistake and refunded the tax money, along with a \$500 goodwill payment, to Graham-Rogers in 2016.

¶35 Graham-Rogers's expert, Amy Randall, opined Wells Fargo did not have to pay the taxes in full and include them in Graham-Rogers's mortgage to resolve the tax issue. She opined Wells Fargo could have executed an Agreement of Understanding with Graham-Rogers and her family members to lay out how the property taxes were to be paid on Tract M and Lot 3 or, alternatively, Wells Fargo could have requested the joint owners of Lot 3 and Tract M furnish Wells Fargo with annual receipts from Gallatin County, demonstrating they had paid the property taxes.

¶36 Given these circumstances, there are issues of material fact whether Wells Fargo's actions were necessary. Wells Fargo and the majority both state the taxes had to be paid to stop the tax lien sale and protect Wells Fargo's interest in the property. This is true, but this does not mean it was necessary for *Wells Fargo* to pay the taxes without first allowing Graham-Rogers and the other joint owners of the property an opportunity to resolve the issue. In fact, paragraph 7, along with creating a separate obligation to "pay all governmental or municipal charges, fines and impositions that are not included in paragraph 2," required Graham Rogers to "promptly furnish . . . receipts evidencing these payments" upon Wells Fargo's request. There is no evidence Wells Fargo requested that Graham-Rogers furnish such receipts, thus giving her an opportunity to resolve the payment of property taxes with her other co-owners before Wells Fargo acted unilaterally. This is not a case where Graham-Rogers refused to pay her property taxes and did nothing

to resolve the issue. To the contrary, Graham-Rogers has been proactive since 2007 in resolving issues that have arisen with servicing the mortgage and paying property taxes on Tract M. And she continued to be proactive in attempting to resolve the issues Wells Fargo created in paying the taxes without consulting her. There is no evidence Wells Fargo determined there was no other solution workable for both parties before unilaterally deciding to pay the taxes for the entirety of Lot 3 and raising Graham-Rogers's monthly payments.

¶37 Wells Fargo insists it had no obligation to negotiate an agreement with Graham-Rogers's non-party family members to satisfy Graham-Rogers's contractual obligation to pay taxes. But it was obligated to take only "necessary" actions to protect its interest in the property. I believe there is a question of fact whether it was necessary for Wells Fargo to pay the taxes when it did. The record does not show that Graham-Rogers and her family told Wells Fargo they would not or could not pay the taxes. Graham-Rogers had a history of making timely payments and she actively followed up with Wells Fargo to resolve tax issues in 2007 and 2008. Although Wells Fargo made an offer to assist in separating out Tract M for tax purposes, when Graham-Rogers contacted the bank to accept this offer, it was withdrawn. No litigation or tax collection efforts were being taken by the county at the time Wells Fargo paid the taxes. After Wells Fargo unilaterally paid the taxes, she attempted multiple times to resolve the tax issue with the county and Wells Fargo. Given the facts of this case, I believe it is for the jury to decide whether it was necessary for Wells Fargo to pay the taxes to protect its interest in the property before providing

Graham-Rogers an opportunity to resolve the tax issue with her fellow co-owners. I would reverse the District Court's grant of summary judgment and remand for further proceedings.

/S/ INGRID GUSTAFSON

Justices Laurie McKinnon and James Jeremiah Shea join in the dissenting Opinion of Justice Gustafson.

/S/ LAURIE McKINNON

/S/ JAMES JEREMIAH SHEA