NOT DESIGNATED FOR PUBLICATION

Nos. 124,892
125,138
125,697

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

KARBANK HOLDINGS, LLC,
Appellee,

v.

REGIONAL EVANGELICAL ALLIANCE OF CHURCHES, INC.,
Appellant,

and
DIVERSIFIED ACQUISITIONS, LLC,
Appellant.

MEMORANDUM OPINION

Appeal from Johnson District Court; JAMES F. VANO, judge. Opinion filed September 29, 2023. Affirmed in part, vacated in part, and remanded with directions.

Eric G. Kraft, of Eric Kraft Law, P.A., of Olathe, for appellant Regional Evangelical Alliance of Churches, Inc.

John M. Duggan and *David L. Ballew*, of Duggan Shadwick Doerr & Kurlbaum LLC, of Overland Park, for appellant Diversified Acquisitions, LLC.

T. Bradley Manson and *Austin Meagher-Manson*, of Manson Karbank McClaflin, of Overland Park, for appellee Karbank Holdings, LLC.

Before ARNOLD-BURGER, C.J., MALONE and PICKERING, JJ.

MALONE, J.: Karbank Holdings LLC (Karbank) held a right of first refusal on real estate in Johnson County (the Property) under an agreement with Regional Evangelical Alliance of Churches Inc. (REACH). REACH later provided its lender, Diversified Acquisitions LLC (Diversified), a deed in lieu of foreclosure which allowed Diversified to acquire REACH's property (worth approximately $2,000,000) for the balance due on REACH's note ($912,444.84). Karbank sued REACH for breach of the right of first refusal agreement and Diversified for tortious interference with a contract.

Following partial summary judgment and a bench trial, the district court ruled for Karbank on both claims, finding that the deed in lieu agreement amounted to a sale of the Property which triggered Karbank's right of first refusal. The district court found that Karbank was damaged in the amount of $1,087,555.16 by being denied its right of first refusal. It entered judgments against both REACH and Diversified in this amount and also awarded attorney fees. During the litigation, Diversified deeded the property back to REACH and then filed a mortgage foreclosure action against REACH. This action was consolidated with Karbank's lawsuit. The district court granted Diversified a mortgage foreclosure judgment against REACH, but it limited the amount of Diversified's recovery and also held that Diversified's mortgage lien lost priority to Karbank's judgment lien. REACH and Diversified separately appealed the district court's judgments.

Karbank has executed on both judgments with sheriff's sales while the appeals have been pending and has filed satisfaction of judgments in district court. Diversified has appealed from the sheriff's sales, and this court has consolidated all three appeals. Karbank moved to dismiss the appeals on grounds of mootness, acquiescence, and standing. We find the appeals should not be dismissed on any of the grounds asserted by Karbank. For reasons more fully explained in this opinion, we find the district court erred by allowing Karbank to recover duplicative judgments against REACH and Diversified for the same wrong or loss, but we otherwise affirm the district court's judgments.

FACTUAL AND PROCEDURAL BACKGROUND

REACH, led by Reverend Craig McElvain, is a nonprofit organization that plants and develops churches. Diversified is a Kansas limited liability company involved in real estate and business development. David Christie is Diversified's manager and had an 80% ownership interest in Diversified. Matthew Pennington had a 20% interest in Diversified. Karbank is a Delaware limited liability corporation and real estate investment company. Steve Karbank is a member and manager of the limited liability company.

REACH bought the Property in September 2012 and started a church called REACH in the Village. Church parishioners and McElvain loaned $325,000 to REACH for the down payment. REACH obtained a mortgage from Bank of Prairie Village for $990,000. The bank's loan was scheduled to mature in September 2015.

Karbank purchased an office building across and down the street from the Property in 2014. Karbank approached REACH in late 2014 and asked about leasing 60 parking spaces on the Property. Through this process, Karbank learned of the mortgage held by Bank of Prairie Village. As a result, Karbank requested a right of first refusal to buy the Property as part of the lease terms.

In 2015, McElvain became ill and later suffered an injury which rendered him unable to continue preaching. McElvain asked Christie, a trustee of REACH in the Village, to help manage REACH's business affairs. As a result of McElvain's absence, the church began to struggle financially. The church ultimately closed.

REACH and Karbank executed two agreements, a "Parking Lot Lease Agreement" and a "Rights of First Negotiation and First Refusal Agreement," in July 2015. Christie negotiated the terms of the agreements on behalf of REACH. The agreement pertaining to right of first refusal provided that REACH needed to notify Karbank of any intent to sell the Property and to deliver Karbank all contract documents if REACH did enter into a contract or any other understanding to sell the Property. Karbank paid $70,000 in consideration for the agreements.

When REACH's mortgage note became due in September 2015, Bank of Prairie Village declined to extend the note because the church had closed. The bank asked Christie if he would purchase the loan. According to Diversified, Christie called Karbank in October 2015 and stated that he planned to purchase the loan to avoid foreclosure. According to Karbank, at the time of the call it did not know that REACH was in default on its note and had decided to close operations. Christie suggested that the Property could be purchased for $1.5 million. Neither Christie nor anyone else associated with REACH sent documents to Karbank under the right of first refusal agreement.

In November 2015, REACH executed a document titled "Commercial Exclusive Rights to Represent Seller/Landlord Agreement." This agreement gave Christie's entity, Christie Development Associates, LLC, the exclusive right to sell or lease the Property. The agreement listed the sale price of the Property at $1.5 million. When a "for sale" sign was placed on REACH's property, Pennington's information was provided for contact. Days later, Bank of Prairie Village entered into a loan sale agreement with Diversified to purchase REACH's note and mortgage for $909,000.

The next month, in December 2015, Diversified and REACH completed a loan modification and deed in lieu agreement. The agreement extended the maturity date of the note to May 2016. If REACH failed to satisfy the note, then the deed in lieu agreement required REACH to deed the Property to Diversified in exchange for forgiveness of the loan balance. The agreement also provided that REACH would engage Christie as a broker to try to sell the Property before the extended maturity date, consistent with the prior written agreement between REACH and Christie's company.

The Property was not sold before the extended maturity date, and as anticipated, REACH defaulted on the loan in May 2016. Diversified filed the deed in lieu of foreclosure in June 2016. The month before REACH defaulted on the loan, Diversified verbally asked Karbank if it wanted to buy the Property for $1.9 million. Diversified also made this offer in writing to Karbank the day after REACH defaulted. Karbank did not respond to these offers.

Throughout June and July 2016, Diversified received two offers of $2.1 million for the Property. One of these offers was from BK Properties, Inc. Another offer was from Pendev, LLC, a business wholly owned and operated by Pennington. Diversified asked Karbank if it would match Pendev's $2.1 million offer. Karbank responded by suing Diversified, REACH, and Pendev. Pendev withdrew its offer to buy the Property. The district court ultimately dismissed Pendev from the lawsuit.

Karbank's cause of action against REACH was for breach of the right of first refusal agreement. Karbank's cause of action against Diversified was for tortious interference with contract. Early in the litigation, the attorney representing REACH and Diversified promised the district court that the parties were "not going to try to sell or do anything with the property" until the issues raised in the lawsuit were settled.

The parties moved for summary judgment asserting the facts were uncontroverted. In March 2018, the district court granted partial summary judgment to Karbank. It found that Karbank established the elements of its breach of contract claim against REACH except for damages. The district court also found that Karbank established the first two elements of tortious interference with contract against Diversified.

After the district court granted partial summary judgment for Karbank, and despite the earlier promise of counsel not to take any actions which might affect the Property, REACH and Diversified entered a compromise and settlement agreement in May 2018 under which Diversified deeded the Property back to REACH and REACH agreed not to pursue legal action against Diversified. Two days later, REACH filed for Chapter 11 bankruptcy to liquidate the Property and pay back its creditors. The Chapter 11 bankruptcy proceeding would have allowed REACH to reject executory contracts under 11 U.S.C. § 365, including the right of first refusal agreement with Karbank. Karbank moved to dismiss the bankruptcy filing on the grounds that it was a bad-faith filing. The bankruptcy court agreed that REACH filed in bad faith and dismissed the case. Karbank claimed to incur over $60,000 in attorney fees as a result of the bankruptcy action.

In January 2019, the district court filed a memorandum decision denying the defendants' motion to reconsider the partial summary ruling. In its decision, the district court found that $912,444.84 was due and owing on the mortgage loan when REACH deeded the Property to Diversified.

Diversified filed a new lawsuit in June 2019 against REACH and Karbank seeking to foreclose its mortgage on the Property. The claims included a breach of note count against REACH, declaratory judgment against Karbank, foreclosure of mortgage lien against both defendants, and breach of assignment of leases and rent against both defendants. As damages, Diversified requested the principal amount due on the note plus interest ($1,402,846) as well as attorney fees. Diversified also asked to foreclose the mortgage and to have priority in the proceeds from the sale of the Property.

The district court consolidated Diversified's new lawsuit with the Karbank action in October 2019. Diversified moved for summary judgment on its claims and on the remaining claims brought by Karbank. The district court denied Diversified's motions. In its memorandum decision, the district court suggested that Diversified, through its conduct, may be estopped from asserting priority on its mortgage.

The matter proceeded to a three-day bench trial in February 2021. Steve Karbank, Matthew Pennington, David Christie, and Craig McElvain all testified at the trial and many exhibits were admitted into evidence. The district court issued a 55-page memorandum decision in December 2021. From the start of the opinion, the district court found that Christie was not credible and that he was "motivated by . . . greed and self-interest." Similarly, the district court believed that REACH and Diversified schemed together "to defeat a remedy for Karbank in this case."

For Karbank's breach of contract claim against REACH, the district court awarded Karbank the difference between the Property's fair market value, found to be $2,000,000, and the amount Karbank would have had to pay to exercise its first refusal rights, the loan balance of $912,444.84 when REACH deeded the Property to Diversified, for a total of $1,087,555.16. The first refusal rights agreement included a clause providing attorney fees to the prevailing party in any litigation arising from the agreement. The district court found that Karbank's reasonable attorney fees for prosecuting the breach of contract claim were $200,000, and it ordered REACH to pay half of these fees.

The district court also ruled for Karbank on its claim against Diversified for tortious interference with contract. The district court applied the same measure of damages—the difference between the Property's value and the amount Karbank would have had to pay to exercise its first refusal rights—for a total of $1,087,555.16. The district court also ordered Diversified to pay the other half of Karbank's attorney fees for prosecuting the breach of contract claim against REACH. The district court also ordered Diversified to pay Karbank's attorney fees of $61,419.27 incurred during the bankruptcy case, for a total attorney fee award of $161,419.27 against Diversified.

As for Diversified's claim against REACH, the district court granted Diversified a mortgage foreclosure judgment but limited the amount of the judgment to $912,444.84, instead of the more than $1.6 million Diversified had requested. The district court also denied Diversified's mortgage lien priority over Karbank's judgment lien on the Property.

Finally, the district court noted that there was a substantial outstanding balance owing for real estate taxes. The district court did not award any specific amount to any of the parties, but it did state that the taxes that became due and payable during the relevant time periods were the responsibility of the record owner of the property at that time. That party would have to indemnify and hold harmless any party that incurred losses as a result of the unpaid real estate taxes. REACH and Diversified separately appealed the district court's judgments.

Execution of judgment against REACH

Immediately after the district court issued a journal entry memorializing its decision, Karbank began executing on its judgments against REACH and Diversified. In March 2022, Karbank filed a Writ of Execution for the Sheriff of Johnson County to take immediate possession of the Property and sell it to satisfy Karbank's judgment against REACH. The district court, noting that REACH had not applied for or received a stay of execution on the court's judgment, issued the writ and authorized the sale of the Property. In April 2022, Karbank moved for an order to sell the Property. The district court heard the motion the next month. REACH did not appear at the hearing but Diversified did. At the start of the hearing, the district court observed that it was strange that REACH had not posted a supersedeas bond to stay execution of the sale.

The district court also thought it was strange that Diversified had not begun collecting its mortgage foreclosure judgment against REACH. Diversified explained that it was "weary [*sic*] that there would be any sort of argument that we've acquiesced in the judgment in any way by operating in such a manner in response to the judgment." Diversified also voiced concerns over how the proceeds from the sale of the Property would be allocated between it and REACH. Diversified noted that the district court found that Karbank was damaged in the amount of $1,087,555.16, yet it ordered both REACH and Diversified to each pay that full amount rather than finding them jointly and severally liable. The district court entered an order allowing the sale of the Property subject to Diversified's mortgage judgment.

The day before the Property was scheduled to be sold, REACH objected to the sale. REACH's primary objection was to the minimum sale price for the Property set by the district court.

Karbank was the only bidder for the Property. Karbank credit bid its judgment against REACH including interest in the amount of $1,214,925.41. Karbank moved to confirm the sheriff's sale. Diversified objected to confirming the sale. Like REACH, Diversified argued that the minimum sale price for the Property should be $2 million. Diversified also argued that, should the district court confirm the sale, it should apply the $1,214,925.41 bid to reduce Karbank's judgments against both REACH and Diversified.

REACH also filed a motion opposing confirmation of the sale of the Property. REACH raised many of the same points as Diversified, asserting that Karbank would be unjustly enriched if the district court permitted it to recover duplicative damages from both REACH and Diversified. Notably, REACH argued that Karbank was "over-secured in its judgment" and asked the district court to "stay all execution until the appeal has concluded." REACH argued that the district court had the authority to stay the case even though REACH had not posted a supersedeas bond.

The district court confirmed the sale of the Property in August 2022. The district court denied REACH's request for a stay of execution because "REACH has not filed a supersedeas bond and the Court is unaware of whether REACH is pursuing an appeal at this time." The district court also denied Diversified's objections to the sale. The district court ordered the sheriff's deed to be issued once Karbank paid the outstanding taxes on the Property. Karbank received and recorded the deed to the Property in September 2022. Karbank filed a satisfaction of judgment as to REACH in November 2022.

Execution of judgment against Diversified

Meanwhile, Karbank was also executing its judgment against Diversified. At first, Karbank tried to execute on the promissory note and mortgage held by Diversified on the Property. Diversified objected to the sale for several reasons including its claim that the underlying decision granting judgment to Karbank was incorrect. Diversified stated that it "[did] not acquiesce to the Journal Entry of Judgment or any adverse ruling" and noted that it was appealing the judgment. But the execution moved forward, and the sheriff seized the mortgage and note. Karbank was the highest bidder at the sheriff's sale.

When Karbank moved to confirm the sale, Diversified objected again on several grounds. Diversified argued that Karbank sought double recovery because it was asking the district court to apply the proceeds from the sale to its judgment against Diversified, but it did not request that the proceeds also be applied to its judgment against REACH. Diversified asked the district court to deny Karbank a "double recovery for the same injury." Karbank noted that Diversified and REACH had not requested a stay or posted a supersedeas bond and argued that it had the right to execute on its judgments against Diversified and REACH separately. The district court declined to address the double damages argument and noted that damages were addressed in its 55-page memorandum decision. That decision was on appeal, and the case had not been stayed nor had a supersedeas bond been posted. The district court denied Karbank's motion to confirm the sale on other grounds after finding that the note merged into the judgment.

After the district court declined to confirm the sheriff's sale of Diversified's *note and mortgage* on the Property, Karbank attempted to execute on Diversified's mortgage foreclosure *judgment* against the Property. Karbank requested that the district court issue an order to sell a certified copy of the journal entry of judgment dated February 7, 2022, granting a foreclosure judgment to Diversified. The district court issued an order of sale of the mortgage foreclosure judgment. The total mortgage foreclosure judgment was $915,779.09. The sheriff auctioned the judgment in August 2022. Karbank credit bid a portion of its $1.2 million judgment against Diversified for the mortgage foreclosure judgment, and it was the only bidder at the sale. The result of this sale was that Karbank now owned the Property free of Diversified's mortgage foreclosure judgment.

Diversified again objected to confirming the sale, making the same argument about double recovery as it had made throughout the collection proceedings. At oral argument, Diversified stated that it was not acquiescing to the judgment. Diversified specified that it was not asking the district court to reconsider its judgment, but to interpret it in a manner that precluded double recovery. The district court took the matter under advisement and promised to conduct research on the double recovery issue.

The district court ultimately confirmed the sale of the mortgage foreclosure judgment. The district court disagreed with Diversified and REACH's arguments that it was permitting Karbank to recover duplicative damages. Karbank filed a satisfaction of the mortgage foreclosure judgment in November 2022. Although Diversified still owed Karbank over $300,000 on Karbank's judgment against Diversified for tortious interference with contract, Karbank filed a satisfaction of that judgment in November 2022. Diversified appealed the district court's confirmation of the sheriff's sales.

Karbank's motions to dismiss the appeals

Karbank moved to dismiss REACH's appeal of the underlying judgment, Diversified's appeal of the underlying judgment, and Diversified's appeal of the order confirming the sheriff's sales of the Property and the mortgage foreclosure judgment.

Karbank asked to dismiss the appeals on grounds of mootness, acquiescence, and standing. This court denied the motions on present showing, noting that the issues raised required a more comprehensive review of the record than could be taken at that stage of the proceedings. This court also directed the parties to address these issues at oral argument along with the claims related to the merits of the appeal. Karbank's counsel confirmed in oral argument that Karbank still owns the Property.

SHOULD THE APPEALS BE DISMISSED BASED ON MOOTNESS, ACQUIESCENCE, OR STANDING?

Karbank moved to dismiss the appeals based on mootness, acquiescence, and standing. This court denied the motions on present showing but asked the parties to discuss the issues during oral argument. We again find that the appeals should not be dismissed on any grounds asserted by Karbank. In doing so, we will reference the arguments made by the parties in the motions to dismiss and responses thereto, and we will sometimes refer to REACH and Diversified collectively as the appellants.

Mootness

Karbank claims that REACH's and Diversified's appeals of the underlying judgment are moot because the judgments have been satisfied and released of record. Karbank cites *Security Bank of Kansas City v. Tripwire Operations Group, LLC*, 55 Kan. App. 2d 295, 412 P.3d 1030 (2018). The appellants assert that *Tripwire* is distinguishable and cite cases holding that a court can reverse a judgment on appeal, even if that judgment has been satisfied, and either set aside a judicial sale or award restitution to account for the error.

As a general rule, Kansas appellate courts do not decide moot questions or render advisory opinions. The mootness doctrine is one of court policy, under which the court is to determine real controversies about the legal rights of persons and properties that are actually involved in the case properly before it and to adjudicate those rights in a way that is operative, final, and conclusive. Because mootness is a doctrine of court policy, which courts developed through precedent, appellate review of the issue is unlimited. *State v. Roat*, 311 Kan. 581, 590, 466 P.3d 439 (2020).

In *Tripwire*, the district court granted summary judgment to Security Bank of Kansas City (the Bank) against Anthony Nichols, Tripwire, and Ryan Morris. Nichols appealed. The Bank, using its statutory and contractual right of setoff, took several thousand dollars from an account in Nichols' name and applied it to the judgment while the appeal was pending. Setoff is a self-help remedy and "there is no requirement that any judicial action needs to occur before the bank exercises the remedy." 55 Kan. App. 2d at 298. The Bank then filed a satisfaction of judgment and moved to dismiss the appeal on mootness and acquiescence grounds. The Bank noted that Nichols had not filed a request for stay of proceedings or a supersedeas bond.

This court declined to find acquiescence, even though Nichols did not request a stay or post a supersedeas bond. This court did not believe that Nichols acted voluntarily in paying the judgment. The Bank withdrew the funds from Nichols' account and did not notify him until after the fact that the funds had been withdrawn. This court found that Nichols' failure to post a bond did not, on its own, amount to acquiescence. 55 Kan. App. 2d at 300. Though not finding acquiescence, this court did find that the case was moot. 55 Kan. App. 2d at 301. Because the Bank had used the self-help remedy of setoff, which could have been exercised "before summary judgment was granted by the district court, or even before the lawsuit was filed," any ruling by the Court of Appeals would have been ineffective. 55 Kan. App. 2d at 301.

Karbank cites the following statement from the beginning of the *Tripwire* opinion: "Small actions, at times, have profound legal consequences. The filing of a satisfaction of a judgment is most often the final action in a lawsuit. That is what happened here and is the reason why we dismiss this appeal." 55 Kan. App. 2d at 296. Karbank asserts that the dispositive action in the case was the Bank's filing of a satisfaction of judgment. But reading the opinion as a whole does not support Karbank's assertion that this was the dispositive fact. This court's true focus in *Tripwire* was on the Bank's ability to obtain a remedy without judicial intervention.

This appeal is distinguishable from *Tripwire* because Karbank does not have an extrajudicial or self-help remedy. Whereas the Bank in *Tripwire* could collect the money without assistance from the court, Karbank would have no right to collect the amount of its judgments against REACH or Diversified if the district court had not ruled in Karbank's favor. The question is whether Karbank has shown clearly and convincingly that the actual controversy has ended, the only judgment that could be entered would be ineffectual for any purpose, and the judgment would not impact any of the parties' rights. *Roat*, 311 Kan. at 584.

The appellants assert that if this court reverses the district court's judgments, then it can either set aside Karbank's judicial sales of the Property and the mortgage foreclosure judgment or award restitution. Accordingly, this court could enter a judgment that would impact the rights of the parties and the appeal is not moot. Karbank does not dispute this fact, asserting simply that *Tripwire* controls.

There are a few Kansas cases demonstrating that the appellants' position is viable. The Kansas Supreme Court faced a similar question in *Hubbard v. Ogden*, 22 Kan. 671, 1879 WL 903 (1879). The court stated the issue as follows:

> "Where a judgment is rendered in the district court in favor of the plaintiff Ogden, and against the defendant Hubbard for money, and against Mrs. Hubbard, that certain real estate belonging to her be sold to satisfy said money judgment, and a case for review in the supreme court is then made, settled, signed, attested, and filed in the district

> court, and afterward said real estate is sold on execution in accordance with said judgment—*the judgment-creditor being the purchaser*—and afterward said sale is confirmed by the district court, and afterward the case is taken to the supreme court for review (on said case-made therefor), where the judgment of the district court against Mrs. Hubbard is reversed, then may the said sale be set aside, and the parties placed in the same condition in which they would be if said sale had not been made and if said judgment against Mrs. Hubbard had not been rendered?" 22 Kan. at 672.

The court stated that the "question is not altogether free from difficulty, but we are inclined to think that it should be answered in the affirmative." 22 Kan. at 672. The court discussed section 467 of the Civil Code, which is similar to K.S.A. 60-2410(d):

> "*Reversal of judgment after sale of land; title of purchaser*. If any judgment or judgments in satisfaction of which any lands or tenements are sold shall at any time thereafter be reversed, such reversal shall not defeat or affect the title of the purchaser, or purchasers. In such cases restitution shall be made by the judgment creditors of the money for which such lands or tenements were sold, with lawful interest from the day of sale. This subsection shall not apply in cases of sales under judgments rendered without personal appearance by the party against whom the judgment was rendered, and without service on such party other than by publication, when such sale was made within six months from the date of such judgment."

The Kansas Supreme Court held that this statute only applies "to *bona fide* purchasers, who are not parties to the erroneous judgment, nor responsible therefor, and who do not have reason to believe that such erroneous judgment will be reversed or vacated by the appellate court." 22 Kan. at 673. The statute only applies "to strangers to the judgment, who have purchased under the honest belief that the judgment is sufficient." 22 Kan. at 673. The court concluded that "[i]t would not be in consonance with justice or equity to allow a party who had procured an erroneous judgment, and who had procured property thereunder, to retain the fruits of such judgment after it had been set aside and annulled by the superior court." 22 Kan. at 673.

More recent cases have also found that a judgment executed upon can be reversed. See *Cimarron Feeders v. Bolle*, 28 Kan. App. 2d 439, 451, 17 P.3d 957 (2001) (reversing judgment against defendant even though plaintiffs had satisfied part of the judgment by buying the defendant's property interest at a sheriff's sale); *Van Nguyen v. Ortiz*, No. 94,884, 2007 WL 881848, at *4 (Kan. App. 2007) (unpublished opinion) (finding that, even though a judgment had been satisfied, it could still be set aside and restitution made for the execution and satisfaction of the judgment).

Tripwire is distinguishable, and Karbank provides no other argument to support its claim that the appeals should be dismissed as moot. We agree with the appellants that if the district court's judgments for Karbank are reversed on appeal, then the appellate court can either set aside the judicial sales or award restitution to provide appropriate relief. Thus, we conclude the appeals should not be dismissed on mootness grounds.

Acquiescence

Karbank also argues that REACH and Diversified acquiesced in the district court's judgments by not posting a supersedeas bond and not asking to stay execution of Karbank's judgments against them. In particular, Karbank argues that Diversified acquiesced in the judgment by asking the district court to apply Karbank's collection efforts against REACH to Karbank's judgments against Diversified.

Acquiescence in a lower court's judgment by an appealing party raises a jurisdictional issue over which this court exercises unlimited review. *Tripwire*, 55 Kan. App. 2d at 300. "[A]quiescence in the judgment cuts off the right of appellate review." *Younger v. Mitchell*, 245 Kan. 204, 206, 777 P.2d 789 (1989).

Acquiescence occurs when a judgment debtor voluntarily accepts the burdens or benefits of a judgment. "Whether a payment of a judgment is voluntary depends on the facts of the particular case, and the ultimate issue is whether the payer intended to waive his or her legal rights." *Tripwire*, 55 Kan. App. 2d at 300. "The mere statement of an intent not to waive the right to appeal does not make a payment involuntary." *Varner v. Gulf Ins. Co.*, 254 Kan. 492, 497, 866 P.2d 1044 (1994).

"Kansas has long followed a 'different drummer' than the majority of states concerning acquiescence." *Huet-Vaughn, M.D. v. Kansas State Bd. of Healing Arts*, 267 Kan. 144, 147, 978 P.2d 896 (1999). Kansas permits "less liberality of conduct . . . than many other courts of last resort are disposed to allow when dealing with the same subject." *Seaverns v. State*, 76 Kan. 920, 921-22, 93 P. 163 (1907). In other words, Kansas courts are more likely to find acquiescence where other courts do not. The Kansas Supreme Court has suggested that this liberality results from the fact that "it is so very easy in this state to procure a stay of execution, supersedeas, or the like" and that states which apply the doctrine of acquiescence less liberally do not permit stays of execution as easily. *Paulsen v. McCormack*, 133 Kan. 523, 527, 1 P.2d 259 (1931).

In *Vap v. Diamond Oil Producers, Inc.*, 9 Kan. App. 2d 58, 671 P.2d 1126 (1983), Ellen Vap obtained a default judgment against Diamond Oil Producers, Inc. After receiving a copy of the judgment, Diamond Oil moved to set it aside under K.S.A. 60-260(b). The district court granted the motion to set aside the default judgment, but before the court issued its ruling Vap garnished the amount of the judgment from Diamond Oil's bank account and filed a satisfaction of judgment. The district court later reinstated the default judgment and Diamond Oil appealed. On appeal, Vap argued that Diamond Oil acquiesced in the judgment and made a voluntary payment because it "was fully aware of [Vap]'s right to garnish, yet [Diamond Oil] failed to attempt to procure a stay of execution, to post a supersedeas bond, or to take any action to halt the execution of the judgment." 9 Kan. App. 2d at 60. This court agreed with Vap, reasoning:

> "[Diamond Oil] was aware of [Vap]'s intent to garnish, yet took no action under K.S.A. 60-262(b) to stay the proceedings to enforce judgment, or under 60-2103(d) to obtain a supersedeas bond. When faced with the choice of whether to pay the judgment or to attempt to halt the execution of judgment, [Diamond Oil] affirmatively chose the former. Under the circumstances of this case, such action can only be viewed as voluntary. Because [Diamond Oil] voluntarily paid the judgment and thereby assumed the burden of the judgment, it should be deemed to have acquiesced in that judgment. [Diamond Oil's] right to appellate review is therefore cut off." 9 Kan. App. 2d at 61.

Vap can be contrasted with *Citifinancial Mortg. Co., Inc. v. Clark*, 39 Kan. App. 2d 149, 177 P.3d 986 (2008). There, Citifinancial initiated a mortgage foreclosure proceeding and received a judgment in excess of $70,000. The sale was held and Citifinancial did not appear. Lorin Brunsvold was the highest bidder at $6,050. Citifinancial moved to substitute bid and confirm sheriff's sale at upset price or, alternatively, set aside the sale under K.S.A. 60-2415(b) because of a substantially inadequate bid. Following a bench trial, the district court denied Citifinancial's motion and confirmed the sheriff's sale. The sheriff issued the deed to Brunsvold following the district court's confirmation of the sale. Citifinancial appealed.

On appeal, Brunsvold argued that Citifinancial acquiesced in the district court's judgment by taking no action to stay the execution. Brunsvold asserted that he had "undertaken improvements to the real estate, paid real estate taxes, maintained insurance premiums for the real estate, and otherwise exercised ownership rights to the real estate since the sheriff's deed issued." 39 Kan. App. 2d at 156. This court declined to find that Citifinancial acquiesced, reasoning: "Here, Citifinancial simply took no action to stay execution of the judgment, such as posting a supersedeas bond under K.S.A. 60-2103(d). Our appellate courts have held that the mere failure to stay execution of the judgment by filing a supersedeas bond does not constitute acquiescence." 39 Kan. App. 2d at 156-57.

This case is more similar to *Citifinancial* than *Vap*. REACH and Diversified argue that accepting Karbank's position would require future appellants to file supersedeas bonds to stay execution of any judgment on appeal. But K.S.A. 2022 Supp. 60-2103 states that "[w]henever an appellant entitled thereto *desires* a stay on appeal, such appellant *may* present to the district court for its approval a supersedeas bond which shall have such surety or sureties as the court requires." (Emphasis added.) The Kansas Supreme Court has held that "[s]ince the statute envisions situations in which a party takes an appeal without posting a supersedeas bond, the legislature could not have intended to condition the right of appeal on the posting of such a bond." *Younger*, 245 Kan. at 209.

Karbank asserts that Diversified did more than fail to post a supersedeas bond. According to Karbank, Diversified assumed the burden of the judgments by repeatedly asking the district court to apply the proceeds from Karbank's execution against REACH to Karbank's judgments against Diversified. Karbank argues that Diversified's requests for offset means that Diversified recognized Karbank's judgments as valid.

It is true that Diversified believed that the district court improperly awarded duplicative damages to Karbank. When Diversified raised this issue early in the execution process, the district court said it "sound[ed] like a motion to alter or amend the judgment" which it could not rule on because the case was on appeal. Despite this discouragement from the district court, Diversified repeatedly asked the district court not to allow Karbank to recover its damages against both REACH and Diversified.

It would be quite a stretch to say that Diversified's argument, which the district court held attacked the judgment, was an acquiescence in the judgment. This was more of a protective measure taken by Diversified to limit the damage caused by the judgment it was protesting on appeal. "[I]t is generally the rule that a waiver is not implied from measures taken by an appellant in defense of and to protect his rights or interest." *McDaniel v. Jones*, 235 Kan. 93, 104, 679 P.2d 682 (1984).

In sum, a party's failure to post a supersedeas bond does not amount to acquiescence, which requires a voluntary satisfaction of judgment. We conclude the appeals should not be dismissed based on acquiescence in the judgment.

Standing

Finally, Karbank argues that Diversified lacks standing to challenge the mortgage foreclosure judgment that the district court awarded it against REACH because Karbank purchased the mortgage foreclosure judgment at a sheriff's sale and later filed a satisfaction of the mortgage judgment. On appeal, Diversified challenges a couple of aspects of the district court's mortgage foreclosure judgment. First, Diversified argues that the district court erred by finding that Diversified was estopped from asserting priority under the mortgage. Second, Diversified argues that the district court improperly limited the amount Diversified was entitled to recover and that the district court should have awarded it a judgment in excess of $1.6 million. Karbank asserts that Diversified lacks standing to challenge the district court's rulings regarding the mortgage foreclosure judgment because Diversified no longer owns the mortgage foreclosure judgment.

Standing is a component of an appellate court's jurisdiction. *Sierra Club v. Moser*, 298 Kan. 22, 29, 310 P.3d 360 (2013). Whether a party lacks standing is a question of law over which this court exercises unlimited review. 298 Kan. at 29. Generally, "a person suing individually must show a cognizable injury and establish a causal connection between the injury and the challenged conduct." 298 Kan. at 33. "To establish a cognizable injury, a party must establish a personal interest in a court's decision and that he or she personally suffers some actual or threatened injury as a result of the challenged conduct." 298 Kan. at 33.

Diversified argues that it still has a stake in this controversy. As we have discussed, a judgment executed upon can be reversed. See *Cimarron Feeders*, 28 Kan. App. 2d at 451. Diversified notes that if Karbank's position is accepted by this court, then this court would effectively require appellants to post a supersedeas bond. Otherwise, an appellant would run the risk that the appellee would quickly execute on its judgment and divest the appellant of standing to appeal, thereby evading appellate review.

We agree with Diversified's argument on the standing challenge. Diversified has a stake in the controversy even though Karbank has executed upon its judgments. Diversified's alleged injuries are unchanged by Karbank's actions. Should this court agree with Diversified's arguments on appeal about the mortgage foreclosure judgment, it can either set aside the judicial sale of the mortgage foreclosure judgment or order that restitution be made by any unjustly enriched parties. Thus, Diversified's appeal of the mortgage foreclosure judgment should not be dismissed on standing grounds.

DID THE DISTRICT COURT ERR IN FINDING THAT REACH BREACHED THE RIGHT OF FIRST REFUSAL AGREEMENT WITH KARBANK?

REACH and Diversified both argue that the district court erred in finding there was a sale of the Property that triggered Karbank's right of first refusal when REACH and Diversified modified the terms of the loan and entered the deed in lieu agreement. Karbank argues that the district court correctly found, under the unique facts here, that REACH breached the right of first refusal agreement when it voluntarily agreed to deed the Property to Diversified in exchange for forgiveness of the loan balance.

An appellate court exercises unlimited review over the interpretation and legal effect of written instruments and is not bound by the lower court's interpretations or rulings. *Trear v. Chamberlain*, 308 Kan. 932, 936, 425 P.3d 297 (2018). Moreover, the district court granted partial summary judgment to Karbank on this issue, finding that

Karbank had established the elements of its breach of contract claim against REACH except for damages. Our standard of review of summary judgment is well known:

> "Summary judgment is appropriate when the pleadings, depositions, answers to interrogatories, admissions on file, and supporting affidavits show that no genuine issue exists as to any material fact and the moving party is entitled to judgment as a matter of law. The district court must resolve all facts and reasonable inferences drawn from the evidence in favor of the party against whom the ruling is sought. When opposing summary judgment, a party must produce evidence to establish a dispute as to a material fact. In order to preclude summary judgment, the facts subject to the dispute must be material to the conclusive issue in the case. Appellate courts apply the same rules and, where they find reasonable minds could differ as to the conclusions drawn from the evidence, summary judgment is inappropriate. Appellate review of the legal effect of undisputed facts is de novo. [Citation omitted.]" *GFTLenexa, LLC v. City of Lenexa*, 310 Kan. 976, 981-82, 453 P.3d 304 (2019).

The contracts at issue here are the Rights of First Negotiation and First Refusal Agreement between REACH and Karbank and the Loan Modification and Deed-in-Lieu Agreement between REACH and Diversified. The material terms of these contracts should be examined first.

The Rights of First Negotiation and First Refusal Agreement described the operation of the refusal right as follows:

> "3.1 In the event that Grantor desires to enter into a contract or any other understanding to sell the Property, Grantor shall, by notice to Grantee (the 'Purchase Offer Notice'), deliver to Grantee a true and complete copy of the to be executed contract signed by the Purchaser, and or a fully executed contract including all exhibits thereto (the 'Purchase Officer Notice Contract'), together with a certificate, signed by the Grantor, stating that '*The enclosed contract is a true and complete copy of the contract which we intend to enter into or The Grantor has entered into to sell the Property.*'

"3.2 Grantee shall thereafter have the exclusive right, for a period of thirty (30) days from the date on which the Purchase Offer Notice is delivered to Grantee at the address set forth below (the 'Purchase Offer Period'), to execute and deliver to Grantor a notice (the 'Acceptance Notice') accepting the terms set forth in the Purchase Offer Notice Contract except that:

(a) the closing date for Grantee's purchase of the Property shall be a date (the 'Acceptance Notice Closing Date'), , [*sic*] which shall be the later of (*1*) the closing date set forth in the Purchase Offer Notice Contract (the 'Purchase Offer Notice Closing Date') or (*2*) a business day which is not later than ten (10) days after the Purchase Offer Notice Closing Date;

(b) regardless of the terms of the Purchase Offer Notice Contract, Grantee shall not be required to deliver, as earnest money, a sum greater than five (5%) percent of the purchase price for the Property; and

(d) [*sic*] the Property shall be delivered to Grantee subject to all leases and tenancies of the Property or any portion thereof.

"Upon the expiration of the Offer Period without Grantee's timely delivery of the Acceptance Notice, the Refusal Right shall be deemed to have been waived as to the Purchase Offer Notice Contract."

These sections of the Loan Modification and Deed-in-Lieu Agreement between REACH and Diversified are also pertinent:

"B. **<u>Default</u>**. The Loan matured on September 27, 2015, but has not been paid in full by the Borrower. The Borrower is under default under the terms of the Loan Documents.

"C. **<u>Purpose</u>**. The purpose of this Agreement is to modify the existing Loan Documents to extend the Maturity Date and to provide for the transfer of the Land, including all improvement fixtures and personalty of any types and nature located on or used in the operation of the Land (collectively referred to as the 'Property'), to the Lender or an affiliate of Lender (the 'Transferee'), in the event of the failure of the Borrower to pay the Loan in full on or before the extended Maturity Date.

. . . .

"AGREEMENTS

"1. **EXTENSION OF MATURITY DATE**. In consideration of the sum of $10 and other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, Lender agrees to extend the Maturity Date set forth in the Loan Documents to May 1, 2016 (hereafter, the 'Extended Maturity Date'),

. . . .

"3. **CONVEYANCE OF PROPERTY UPON DEFAULT**. As a material inducement to Lender to enter this Agreement and to agree to the Extended Maturity Date, Borrower has agreed that in the event that Borrower is unable to pay all amounts due under the Loan on or before the Extended Maturity Date, Borrower shall convey the Property to the Transferee in accordance with the provisions described in this Agreement, at which time Borrower shall be released from all of Borrower's liabilities arising under the Loan.

"4. **SALE OF PROPERTY**. Lender hereby discloses that David J. Christie (the 'Broker'), a principal of the Lender, is a real estate broker licensed under the laws of the State of Kansas. Borrower has requested, and Broker has agreed, to diligently pursue the marketing and sale of the Property prior to the Extended Maturity Date pursuant to terms acceptable to Borrower and Lender. Broker shall use commercially reasonable efforts in connection with the marketing of the Property. Broker makes no representation or warranty regarding his ability to sell the Property prior to the Extended Maturity Date.

. . . .

"6. **REPRESENTATIONS AND WARRANTIES**. As a material inducement to Lender to enter this Agreement, Borrower hereby represents and warrants to Lender and to Transferee (if different than Lender) that the following are true and correct as of the date hereof:

. . . .

"6.2 **<u>Non-Coercion</u>**. Borrower enters this Agreement freely based upon its independent judgment, without reservation or coercion in any manner by any person or entity.

. . . .

"8.14 **<u>Entire Agreement</u>**. This Agreement constitutes the entire agreement of the parties with respect to the subject matter hereof, and supersedes all prior or contemporaneous agreements, oral or written, concerning the subject matter hereof, except that the foregoing shall not be construed as limiting the effect of all documents delivered pursuant to paragraph 3 hereof."

REACH and Diversified make two basic arguments. First, they argue that the Loan Modification and Deed-in-Lieu Agreement did not constitute a "contract or any other understanding to sell the Property" as that phrase is used in the Rights of First Negotiation and First Refusal Agreement. Second, even if there were a sale, REACH and Diversified assert that a right of first refusal is triggered only if the terms of the sale can be matched, and Karbank could not match the terms of the sale.

Was there a sale?

A right of first refusal agreement, also called a right of preemption, "does not give to the pre-emptioner the power to compel an unwilling owner to sell, but merely requires the owner, when and if he decides to sell, to offer the property first to the person entitled to the pre-emption at the stipulated price." *Anderson v. Armour & Co.*, 205 Kan. 801, Syl. ¶ 1, 473 P.2d 84 (1970). "The key to activation of a holder's right of first refusal is mutual willingness to enter into a sale at a specific price satisfactory to both the third party and the seller." *Waste Connections of Kansas, Inc. v. Ritchie Corp.*, 296 Kan. 943, 968, 298 P.3d 250 (2013); *Bergman v. Commerce Trust Co., N.A.*, 35 Kan. App. 2d 301, 308, 129

P.3d 624 (2006) (holding that a right of first refusal is activated upon a showing that the owner was "willing to sell the property" and had received "a bona fide written offer to purchase the property that [the owner] was willing to accept").

The right of first refusal agreement between REACH and Karbank adheres to these principles. To trigger Karbank's rights under the agreement, two things were necessary. First, REACH had to have the "desire[] to enter into a contract or any other understanding to sell the Property." Second, there had to be a contract or other understanding with a third party that REACH was willing to accept. When these conditions were satisfied, REACH had the duty to provide the offer to Karbank. The question here is whether REACH was willing to sell the Property to Diversified and whether the Loan Modification and Deed-in-Lieu Agreement between REACH and Diversified constituted a contract to sell the Property.

The definition of "sale" is not limited to situations in which property is exchanged for money. As long as the transfer of property is supported by consideration, a sale may occur. This principle was exemplified in *Anderson*. Armour and Company owned a 30-acre tract of land. Several members of the Anderson family entered a lease with Armour covering 13.75 acres of the tract. The lease granted the Andersons a right of first refusal if Armour decided to "'sell the premises.'" 205 Kan. at 802. Armour conveyed all 30 acres by warranty deed to Iowa Beef Packers, Inc., without providing notice to the Andersons. The Andersons sued for breach of the right of first refusal. Armour argued that the right of first refusal agreement was not breached because it conveyed the entire 30-acre tract of land, not just the 13.75 acres subject to the lease. Armor also argued that the transaction with Iowa Beef Packers was not a sale because it "involved an exchange of properties together with cash." 205 Kan. at 805-06. The Kansas Supreme Court rejected this argument because "as far as the Andersons were concerned—the 13.75 acres were effectively 'sold' and placed beyond their reach—regardless of the details of the transaction between Armour and Iowa." 205 Kan. at 805-06.

Diversified argues that the express terms of the Loan Modification and Deed-in-Lieu Agreement compel a conclusion that REACH did not sell the Property to Diversified because "the Loan Modification expressly provided that REACH Alliance could 'sell' to someone REACH Alliance approved of during the seven (7) month extension period." Diversified asserts that the plain language of the agreement "clearly showed that REACH Alliance intended to 'sell' the Property to someone other than the lender, Diversified, prior to May 1, 2016."

Diversified's argument is not convincing. While REACH was interested in selling the Property at a higher price during the seven-month extension period, it also clearly expressed a willingness to convey the Property to Diversified for the loan balance if the Property did not sell at a higher price. And that is what happened here. REACH conveyed the Property to Diversified, and in consideration of the conveyance, Diversified forgave REACH's $912,444.84 loan balance.

REACH argues that its decision to sell the Property was not voluntary, and thus the requirement that it be willing to sell the property had not been met. REACH cites several cases discussing the relationship between deed in lieu transactions and rights of first refusal to support its position that a deed in lieu is not a voluntary sale. See *Kennedy Blvd. Assocs. I, L.P. v. Tax Revenue Bd. of City of Philadelphia*, 751 A.2d 719, 725-26 (Pa. Commw. Ct. 2000) (holding that a transfer by deed in lieu of foreclosure was not a bona fide sale of real estate at arm's length, nor was it the functional equivalent of a sale upon foreclosure); *Tompkins Land & Housing, Inc. v. Gedeon Group, Inc.*, 644 So. 2d 608 (Fla. Dist. Ct. App. 1994) ("A deed in lieu of foreclosure does not constitute a sale or other conveyance under the terms of the agreement between the parties."); *Ellingson Agency, Inc. v. Baltrusch*, 228 Mont. 360, 366, 742 P.2d 1009 (1987) (holding that a transfer of title in lieu of foreclosure was not a "sale" under Montana law).

But other cases cited by REACH do not provide firm support for its position. In *In re Michael Bahary & Steven Bahary Partnership*, 523 B.R. 642, 648 (Bankr. N.D. Ill. 2015), the court declined to find that a deed in lieu of foreclosure was a sale but cited caselaw in which a deed in lieu of foreclosure was considered a sale. This case demonstrates that the question of whether a deed in lieu transaction constitutes a sale depends on the facts of each case. *Bill Signs Trucking, LLC v. Signs Family Limited Partnership*, 157 Cal. App. 4th 1515, 1528, 69 Cal. Rptr. 3d 589 (2007), also does not support REACH's argument as the court there found that the deed in lieu transaction did not trigger a right of first refusal because the transaction was between coowners of the property and did not involve a third party. Diversified was a third party and not a coowner of the Property. Some cases cited by REACH do not involve deed in lieu transactions at all and do not directly contribute to this analysis. *Prince v. Elm Inv. Co., Inc.*, 649 P.2d 820 (Utah 1982); *Baker v. McCarthy*, 122 N.H. 171, 443 A.2d 138 (1982); *Koella v. McHargue*, 976 S.W.2d 658 (Tenn. Ct. App. 1998); *Byron Material, Inc. v. Ashelford*, 34 Ill. App. 3d 301, 339 N.E.2d 26 (1975); *Wilson v. Grey*, 560 S.W.2d 561 (Ky. 1978); *Rogers v. Neiman*, 187 Neb. 582, 193 N.W.2d 266 (1971).

REACH cites one case, *Prince*, that supports Karbank's position by showing that unique facts can amount to a sale of property that triggers a right of first refusal. In that case, Elm Investment Company (Elm) leased real property to Trolley Square Associates (Trolley). The lease included a right of first refusal to Trolley. Elm entered into an agreement with Boyer-Gardner Partnership Co. (Boyer-Gardner) forming a general partnership (Partnership). Elm owned 51% and Boyer-Gardner owned 49% of the Partnership. Elm contributed the property to the Partnership and Boyer-Gardner agreed to finance and construct an office building, manage the property, and provided Elm an annual $47,000 payment. The Partnership agreement provided that all decisions must be made unanimously by the partners. After learning of the Partnership, Trolley sued Elm and asserted that Elm's contributing the property to the Partnership violated Trolley's right of first refusal. The district court granted summary judgment to Elm on two grounds: (1) the transfer of the property to the Partnership was not a sale that triggered the right of first refusal; and (2) Trolley could not match the terms of the offer that Elm received from Boyer-Gardner. 649 P.2d at 821-22.

On appeal, the court framed the issue as "[w]hether a transfer of property from a lessor to a partnership in which the lessor owns a majority interest but whose management decisions must be made unanimously is a 'sale' for purposes of a lease provision grantee the lessee a right of first refusal." 649 P.2d at 822. After reviewing caselaw, the court found that "a 'sale' occurs upon the transfer (a) for value (b) of a significant interest in the subject property (c) to a stranger to the lease, (d) who thereby gains substantial control over the leased property." 649 P.2d at 823. The court held that those elements were satisfied because the transfer was for value, Boyer-Gardner received a significant interest in the property by virtue of its 49% interest in the Partnership, Boyer-Gardner was a stranger to the lease, and Boyer-Gardner obtained substantial control over the property because of its veto power under the Partnership agreement. 649 P.2d at 823. The court also examined whether Trolley could match the offer that Boyer-Gardner made to Elm and found "that Trolley [was] not precluded as a matter of law from matching the terms offered to the seller by Boyer-Gardner." 649 P.2d at 826.

Kowalsky v. Familia, 71 Misc. 2d 287, 336 N.Y.S.2d 37 (1972) is more favorable to Diversified and REACH than the other cases cited by REACH. The issue in *Kowalsky* was whether there was a sale when the owner of property subject to an option to purchase agreement was informed by the county that the county intended to condemn the land. The county offered to buy the land for $26,000, and the property owner agreed. The holder of the option sued, saying it should have been permitted to step into the shoes of the buyer and exercise its option. The court found "no offer for sale by the present owners." 71 Misc. 2d at 293. "Rather, there ha[d] been an involuntary taking." 71 Misc. 2d at 293.

REACH says this case is like *Kowalsky* because it only agreed to the deed in lieu agreement "to avoid imminent foreclosure" and it "had little choice" but to surrender the Property to Diversified. But the facts here and *Kowalsky* are distinguishable in material aspects. First, REACH was not necessarily facing imminent foreclosure. Diversified conveyed its willingness to extend the loan maturity date to allow REACH the option of selling the Property at a higher price and avoid foreclosure. When the note became due in May 2016, nothing prevented Diversified from again extending the term.

Second, if the property owner in *Kowalsky* had declined to sell the property to the county, the owner would have faced "the possibility of lengthy litigation" which could have reduced the owner's ultimate recovery for the property. 71 Misc. 2d at 288. Thus, the owner did not have much of a choice: he could sell the land to the county for $26,000 or go through condemnation proceedings which may have reduced his recovery. In contrast, REACH's options were to agree to the deed in lieu agreement or go through foreclosure. Given that the value of the Property far exceeded REACH's debt, REACH would have likely received overpayment from a foreclosure. Accordingly, REACH's decision to enter the deed in lieu agreement was not coerced by the risk of foreclosure as foreclosure likely would have been more beneficial to REACH.

Though REACH focuses on cases that declined to find that a deed in lieu of foreclosure was a sale, there are also cases in which courts found that a deed in lieu of foreclosure could be a sale. *Batchelor's Bldg. Maintenance Service, Inc. v. Douglas Ave. Corp.*, 205 Kan. 149, 152, 468 P.2d 189 (1970) (affirming district court decision that construed deed in lieu of foreclosure as a sale); *Felbinger and Co. v. Traiforos*, 76 Ill. App. 3d 725, 730-32, 394 N.E.2d 1283 (1979) (discussing cases in which a deed in lieu of foreclosure was held to be a sale); *John Whiteman & Co. v. Fidei*, 176 Pa. Super. 142, 146-47, 106 A.2d 644 (1954) (finding a sale when property owner conveyed property to mortgagees in return for cancellation of the $18,600 mortgage and payment of $1,000).

These cases demonstrate that each case depends on its facts. In some cases, a deed in lieu of foreclosure between an arm's-length lender and borrower will not be construed as a voluntary sale that would trigger a third party's right of first refusal. In other cases, depending on the facts, a deed in lieu of foreclosure might be construed as a voluntary sale that would trigger a third party's right of first refusal. We must examine the facts here to decide whether the district court erred in finding that the deed in lieu agreement between Diversified and REACH constituted a sale as contemplated by the right of first refusal agreement between Karbank and REACH.

Diversified purchased REACH's mortgage note from the bank when it refused to extend the loan, and Diversified agreed to extend the note's maturity date. Christie negotiated the deal as Diversified's manager while also serving as a trustee of REACH in the Village. The parties knew that REACH would be unable to pay the loan by the extended due date, given that the church was closed and not generating any income. When the note became due seven months later, nothing prevented Diversified from again extending the term. Diversified and REACH did not occupy the positions of an arm's-length lender and borrower, given Christie's positions in the two entities.

Instead, REACH deeded the Property to Diversified in lieu of foreclosure and forgiveness of the debt—a conveyance that allowed Diversified to acquire ownership of the Property for the $912,444.84 loan balance—without notifying Karbank of the transfer and giving it a chance to exercise its first refusal rights. Christie was aware of Karbank's right of first refusal because he had executed the agreement on behalf of REACH. The undisputed facts belie REACH's contention that it "had little choice" but to deed the Property to Diversified in lieu of foreclosure and forgiveness of the debt. Instead, the facts support the district court's conclusion that REACH voluntarily conveyed the Property to Diversified for the balance of the loan without notifying Karbank of the transfer under the terms of the right of first refusal agreement.

Under these facts, the district court did not err in finding that the deed in lieu agreement between Diversified and REACH constituted a sale as contemplated by the right of first refusal agreement between Karbank and REACH. By voluntarily entering the deed in lieu agreement, REACH evinced a willingness to convey the Property to Diversified for the balance on its loan. This triggered Karbank's right of first refusal, and REACH's failure to notify Karbank of the sale amounted to breach of contract.

Could Karbank match the terms of the sale?

REACH and Diversified next argue that Karbank needed to prove that it could have matched the terms of the sale offer and that the terms of the sale offer included all of the terms of the Loan Modification and Deed-in-Lieu Agreement. These terms included Diversified's promise to extend the maturity date of the loan, forbear foreclosure, and release REACH's debt upon receiving the deed from REACH. Another term stated that REACH requested Christie to act as broker in marketing and selling the Property. REACH and Diversified assert that Karbank could not match the terms of the sale offer because Karbank was not the lender and because Karbank did not produce evidence that it was ready, able, and willing to match the terms of the sale offer.

It is correct that Karbank could not perform some terms of the Loan Modification and Deed-in-Lieu Agreement because it was not the lender. But REACH's and Diversified's contention that Karbank had to match every term of the Loan Modification and Deed-in-Lieu Agreement is not supported by the caselaw.

REACH and Diversified cite several cases in support of their contention that a party must be ready, willing, and able to accept the terms of a sale offer to prevail on a claim that a right of first refusal contract was breached. *Kunelius v. Town of Stow*, 588 F.3d 1, 12 (1st Cir. 2009) (holding that, in litigation between property owner and party who exercised right of first refusal, the property owner was bound by liquidated damages clause contained in contract with original buyer); *USA Cable v. World Wrestling Fed'n Ent., Inc.*, 766 A.2d 462, 468 (Del. 2000) (holding that holder of the right of first refusal failed to properly exercise its right because the holder refused to agree to a choice of law and forum selection provision and a cross-promotion provision contained in the original purchase offer); *West Texas Transmission, L.P. v. Enron Corp.*, 907 F.2d 1554, 1563 (5th Cir. 1990) (holding that party who exercised right of first refusal was bound by term in contract with original buyer that the purchase was subject to FTC approval). But these cases are distinguishable because they involve situations where the holder of a right of first refusal was given a chance to exercise its right. These cases also recognize situations where exact matching of terms is not required.

For example, in *Kunelius* the court mentioned several exceptions to the general rule of exact matching. Many courts "make an exception for immaterial terms with which the holder of an ROFR [right of first refusal] need not comply." 588 F.3d at 12. Courts will also "relax the rule of perfect matching in the presence of bad faith." 588 F.3d at 13. The *West Texas Transmission* court made a similar statement, noting that "the owner of property subject to a right of first refusal remains master of the conditions under which he will relinquish his interest, as long as those conditions are commercially reasonable, imposed in good faith, and not specifically designed to defeat the preemptive rights." 907 F.2d at 1563; see also *Miller v. LeSea Broadcasting, Inc.*, 87 F.3d 224, 228 (1996) ("[T]he grantor of the option may not act in bad faith, which in this context means may not, for the purpose of discouraging the exercise of the right, procure from the third party terms that the grantor knows are unacceptable to the holder of the right of first refusal.").

The issue of materiality of the terms may arise in cases involving package deals. In *USA Cable*, USA Cable held the right to televise a series of wrestling events produced by World Wrestling Federation Entertainment Inc. (WWFE). USA Cable held a right of first refusal over the series. WWFE negotiated an integrated package sale deal with Viacom Inc. Only part of the deal related to the wrestling series. WWFE presented the deal to USA Cable. USA Cable claimed to assert its right of first refusal, and the ensuing litigation addressed whether USA Cable adequately matched the terms of the Viacom deal. In its analysis, the court noted that the only material terms USA Cable needed to match were those that related to the wrestling series. 766 A.2d at 466.

Kansas cases also support the idea that a holder of a right of first refusal does not always need to exactly match the terms of a sale offer. *Anderson* again provides a good example. In *Anderson*, Armour breached its right of first refusal agreement with the Andersons by conveying the property subject to the agreement to Iowa Beef Packers. The exact sale offer is unclear from the opinion, but the deal "involved an exchange of properties together with cash." 205 Kan. at 806. The Andersons could not have satisfied the terms of the deal by trading property that belonged to Iowa Beef Packers to Armour because the Andersons did not own the property. Another term of the deal was the Iowa Beef Packers would receive the entire 30-acre tract of land, not just the 13.75 acres subject to the Andersons' right of first refusal. But the Kansas Supreme Court did not require the Andersons to establish that they would have purchased the entire 30 acres. Instead, the opinion stated that the Andersons were entitled to damages only for their loss of the opportunity to buy the 13.75 acres. 205 Kan. at 805.

The district court relied on *Waste Connections* in arriving at the same conclusion, and that case also helps demonstrate that a party need not match the exact terms of a sale offer. Waste Connections had a right of first refusal to buy Richie Corporation's interest in a waste transfer station if Ritchie sold its interest in the station. A landfill, not subject to the right of first refusal agreement, adjoined the station. Ritchie owned a controlling interest in C & D Recyclers of Kansas Inc. which was responsible for the station and landfill. Ritchie and C & D agreed to sell Ritchie's interest in the transfer station, the landfill, and other assets to Cornejo & Sons (Cornejo). The contract listed the purchase price as $4,950,000 and specified that $2,000,000 of the price was allocated for the purchase of Ritchie's interest in the transfer station. The contract also stated that if Waste

Connections exercised its right of first refusal as to the waste station, the remaining assets would be purchased for $3,500,000. Ritchie informed Waste Connections that it could exercise its right of first refusal and purchase the waste station for $2 million. Waste Connections believed it should only have to pay $1.45 million—the difference between the purchase price with and without the waste station.

Contrary to Diversified's assertion, the Kansas Supreme Court did not require Waste Connections to satisfy every term of the agreement between Ritchie and Cornejo to exercise its right of first refusal. All Waste Connections had to do was pay the price that Ritchie would accept for the waste station. The court noted that Cornejo made an offer for the transfer station and Ritchie formed a specific intention to sell the transfer station to Cornejo and that this activated Waste Connections' right of first refusal. 296 Kan. at 970. The sale contract did not address how much Cornejo would pay and Ritchie would accept for the transfer station alone if Waste Connections did not exercise its right of first refusal. The court remanded the case to the district court to decide the "correct right of first refusal exercise price." 296 Kan. at 973.

The district court cited *Waste Connections* for the proposition "that a refusal-right holder could accept a purchase offer for assets including but not limited to the subject of the refusal right, so long as the district court, on remand could fix a price for the particular assets subject to the refusal right." *Waste Connections* supports the district court's conclusion. It shows that a right of first refusal agreement is activated when the property owner is willing to sell the property and had received an offer to buy the property that the owner would accept, even if those intentions are formed within the scope of a sale offer that includes terms the holder of the right of first refusal cannot match. By entering the Loan Modification and Deed-in-Lieu Agreement, REACH demonstrated a willingness to sell the Property in exchange for release of its debt. The district court did not err when it found that Karbank could match the material terms of the sale offer by paying off REACH's loan.

The district court's decision is supported by policy considerations as well. The district court noted that requiring Karbank to match the exact terms offered by Diversified would enable parties to circumvent the rights that right of first refusal agreements are intended to protect. A third party could offer something unique to the grantor, like land owned by the third party or professional services offered by the third party, that the holder of the right could not match. See *Natl. City Bank v. Welch*, 188 Ohio App. 3d 641, 647, 936 N.E.2d 539 (2010) (rejecting district court's analysis that would allow a party to circumvent preemptive rights in property held by another by simply taking a mortgage from the present owner and then foreclosing).

In sum, under these facts, the district court did not err in finding that the loan modification agreement with the deed in lieu of foreclosure from REACH to Diversified amounted to a sale of the property that triggered Karbank's right of first refusal. The district court also did not err in finding that Karbank could match the essential terms of the sale. REACH failed to notify Karbank of the sale so it could exercise its option to match the sale price. Thus, the district court did not err in finding that REACH breached the right of first refusal agreement with Karbank.

DID THE DISTRICT COURT ERR IN FINDING THAT DIVERSIFIED TORTIOUSLY INTERFERED WITH THE CONTRACT BETWEEN KARBANK AND REACH?

"The elements of tortious interference with a contract are: (1) the contract; (2) the wrongdoer's knowledge thereof; (3) his intentional procurement of its breach; (4) the absence of justification; and (5) damages resulting therefrom." *Cohen v. Battaglia*, 296 Kan. 542, 546, 293 P.3d 752 (2013). Diversified focuses on the fourth element and argues that the evidence could not establish the absence of a justification for its conduct. Diversified asserts that its actions throughout the proceedings were justified because it had the legal right to enforce its mortgage.

The district court found that Karbank established the first two elements of tortious interference with contract on summary judgment. But the remaining elements were established by Karbank through the evidence it presented at trial. Diversified suggests that this court should exercise unlimited review over this issue. But the district court made extensive factual findings, including witness credibility findings, based on the trial evidence. When a district court makes factual findings, this court must determine whether those findings are supported by substantial competent evidence. *Geer v. Eby*, 309 Kan. 182, 190, 432 P.3d 1001 (2019). "'Substantial evidence is such legal and relevant evidence as a reasonable person might accept as sufficient to support a conclusion. . . . The appellate court does not weigh conflicting evidence, pass on credibility of witnesses, or redetermine questions of fact.' [Citations omitted.]" 309 Kan. at 190-91. We employ unlimited review over the district court's conclusions of law. 309 Kan. at 191.

Diversified argues that even if it interfered with the right of first refusal contract between Karbank and REACH, it was justified in doing so because it had the legal right to enforce its purchase-money mortgage. Tortious interference with a contract is "predicated on malicious conduct by the defendant." *Turner v. Halliburton Co.*, 240 Kan. 1, 12, 722 P.2d 1106 (1986). Thus, not all interference with contractual relationships is tortious. In some cases, a person's interference may be privileged or justified. *Reebles, Inc. v. Bank of America, N.A.*, 29 Kan. App. 2d 205, 211, 25 P.3d 871 (2001).

> "'Justification is the most common affirmative defense to an action for interference. The term 'justification' has been said not to be susceptible of any precise definition. It is employed to denote the presence of exceptional circumstances which show that no tort has been in fact committed and to connote lawful excuse which excludes actual or legal malice. It has been suggested that, rather than to express this defense to interference in terms of justification, it might be more accurately stated to be a matter of privilege; that is, the defendant may show that interference, although it occurred, is privileged by reason of the interests furthered by his conduct. . . .

"'. . . Generally, a circumstance is effective as a justification if the defendant acts in the exercise of a right equal or superior to that of the plaintiff, or in the pursuit of some lawful interest or purpose, but only if the right is as broad as the act and covers not only the motive and purpose but also the means used.'" *Turner*, 240 Kan. at 12-13 (quoting 45 Am. Jur. 2d, Interference § 27).

There are several factors to consider when determining whether a defendant's conduct in interfering with a contract is improper:

"(1) the nature of the defendant's conduct; (2) the defendant's motive; (3) the interests of the other with which the defendant's conduct interferes; (4) the interests sought to be advanced by the defendant; (5) the social interests in protecting the freedom of action of the defendant and the contractual interests of the other; (6) the proximity or remoteness of the defendant's conduct to the interference; and (7) the relations between the parties." *Reebles*, 29 Kan. App. 2d at 212.

No one questions the general proposition that lenders like Diversified can agree to modify the terms of a loan. There is also no question that Diversified had the legal right to accept a deed in lieu of foreclosure. Diversified says the analysis should end there: it had the legal right to act in the manner that it did and thus its interference with the right of first refusal contract was justified. Karbank, on the other hand, argues that Diversified's actions should not be considered in a vacuum. Instead, "it was the secrecy of the 'agreement' and the context surrounding the transaction that was tortious."

The issue of justification is more nuanced than determining whether a party had a legal right to act in the manner in which it acted. The question is really whether that action was justified or improper under the circumstances. This concept was demonstrated in *Reebles*, 29 Kan. App. 2d 205. Reebles Inc. leased commercial real estate to Nautilus of Emporia, Inc. Kristina Brown owned Nautilus and operated an exercise center from the property. She personally guaranteed the lease for Nautilus. Brown obtained a loan from Bank of America and pledged the exercise equipment as collateral for the loan. The bank perfected its security interest in the equipment. Nautilus failed to pay Reebles rent totaling $6,400. Brown entered an agreement with Wade Criqui under which Criqui would purchase Brown's exercise equipment and other assets for $85,000 if certain conditions were met, including: (1) Reebles consented to assignment of the Nautilus lease to Criqui; (2) all accounts payable incurred before closing (notably the back rent) would be paid from the sale proceeds by the closing agent; and (3) the exercise equipment was free and clear of all liens. The parties disagreed as to whether the bank agreed to pay the back rent to Reebles from the proceeds of the sale. When the bank closed the sale, the bank applied the whole $85,000 to the outstanding balance on Brown's note and did not pay the back rent.

Reebles sued the bank for tortious interference with a contract. The bank argued that it was justified in interfering with the sales agreement because it was protecting its security interest. The district court agreed that the bank acted properly under the terms of its security agreement with Brown and granted summary judgment to the bank. This court reversed, holding that genuine issues of material fact existed which precluded summary judgment. 29 Kan. App. 2d at 213. This court held that if the fact-finder believed Reebles' version of the facts, then the fact-finder could find the bank liable for tortious interference with the contract. 29 Kan. App. 2d at 213.

No one in *Reebles* contested the principle that secured creditors have a legal right to protect their security interests. But that fact did not insulate the bank from potential liability for tortious interference with a contract. Instead, this court focused on the steps that the bank allegedly took to divert the funds from Reebles and toward the bank's own interests, particularly that the bank made an untrue representation about its intentions with the sale proceeds and acted in a manner that eliminated Reebles from the transaction for the bank's financial gain. Similar concepts are at play here. Karbank did not question Diversified's right to enter the deed in lieu agreement. Instead, Karbank challenges the secrecy of the agreement between REACH and Diversified to essentially sell the Property to Diversified for $912,444.84. As in *Reebles*, Karbank argues that Diversified acted in a way that it thought would preclude Karbank from exercising its first refusal rights and allow Diversified to acquire the Property for much less than its market value.

Diversified also supports its position by citing the Restatement (Second) of Torts § 773 (1979) for the proposition that "[a] party is justified in interfering with a third party's contract if it 'asserts in good faith a legally protected interest of its own . . . .'" Diversified's recitation of the rule in § 773 is only partially correct. The full statement of the rule says that to be justified in interfering with a contract, a party also must "believe[] that his interest may otherwise be impaired or destroyed by the performance of the contract or transaction." Restatement (Second) of Torts § 773.

This idea was discussed in *Cohen v. Battaglia*, 41 Kan. App. 2d 386, 202 P.3d 87 (2009), *rev'd on other grounds* 296 Kan. 542, 293 P.3d 752 (2013). In that case, the district court dismissed a claim of tortious interference with contract against Marion Battaglia. The district court reasoned that Battaglia's conduct was justified under § 773 because Battaglia acted to protect a legal interest. Though this court affirmed the district court's ultimate decision, it found the district court's reliance on § 773 was "misplaced." 41 Kan. App. 2d at 402. This court explained that conduct is not always justified when a party acts to protect a legal interest. Rather, "§ 773 protects only those actions which were taken *in good faith* and where the person believed the action was necessary to preserve a legally protected interest." 41 Kan. App. 2d at 401. Thus, the fact that Diversified was asserting a legally protected interest is not enough—it had to assert its interest in good faith and believe that assertion of the interest was necessary to protect it.

Here, the district court made detailed findings on justification, discussing each of the seven factors for determining whether Diversified's interference with the contract was improper. See *Reebles*, 29 Kan. App. 2d at 212. We will review these findings to determine whether they are supported by substantial competent evidence and whether they support the district court's ultimate legal conclusion that Diversified tortiously interfered with the right of first refusal contract between Karbank and REACH.

What was the nature of Diversified's conduct?

The district court thought nothing was inherently wrong with Diversified obtaining the note and mortgage from the bank. Similarly, the district court found no problem with Diversified's decision to extend the loan with REACH. According to the district court, the tortious interference arose "when Diversified induced REACH to keep that deal secret and not notify Karbank that it could satisfy the mortgaged loan debt and obtain a fee simple deed to the property itself under the terms of its first rights agreement." The district court believed that Diversified, acting through Christie, "assumed a 'business manager' position for REACH and manipulated it to gain control of the equity in REACH's property for Diversified to Karbank's detriment."

There is substantial competent evidence in the record to support the district court's finding that Diversified induced REACH to not notify Karbank of the deed in lieu of foreclosure agreement between Diversified and REACH. Steve Karbank testified that no one notified Karbank when REACH and Diversified executed the agreement. Christie's testimony also supported this fact—he stated that he did not inform Karbank of the deal because he did not consider it to be a sale. Rather, he thought that Diversified was merely exercising its legal right to modify the loan documents.

As explained above, Diversified's claim that it was merely asserting its legal rights as lender is incomplete. Interference with a contract is not permissible in every case in which the interfering party is asserting a legal right. The party interfering with the contract must also act in good faith, and the party must believe the action is necessary to preserve a legally protected interest. Diversified fails to address why keeping its agreement with REACH a secret was necessary to protect its legal interest in being paid the balance of the mortgage. Had REACH complied with the right of first refusal agreement and offered the Property to Karbank on the same terms as its offer to Diversified, and Karbank accepted the offer, then Karbank would have had to buy the loan from Diversified and Diversified's legal interest in being paid the balance of the loan would be satisfied. There is no evidence that the deed in lieu of foreclosure agreement had to be kept a secret to protect Diversified's legal interest.

What was Diversified's motive?

The district court found that Diversified's motive "was to obtain the sole position of decision maker and be sole owner and possessor regarding the equity in the REACH property and to extinguish every other interest, including Karbank's contract interest and even REACH itself, in that property." The district court noted that a foreclosure sale would have been more advantageous to REACH, which would likely have received overpayment from a sheriff's sale, but instead Diversified "looked for a shortcut to gain full control of the REACH property."

Diversified, both below and in its arguments on appeal, does not really dispute that it sought to gain full control of the Property to the exclusion of Karbank. But Diversified claims that it had an altruistic motive in doing so. According to Christie, Diversified acquired the Property with the intent of selling it and donating the proceeds of the sale to REACH and its investors. Christie testified that he at first took over the loan because he was concerned that REACH's stakeholders would not be paid back if the bank foreclosed on the Property. Christie said that when he negotiated the deed in lieu of foreclosure agreement, which ultimately enabled Diversified to acquire the Property for the loan balance despite it having a much higher value, he promised REACH that he would sell the Property and use the proceeds to ensure all stakeholders were paid and that McElvain's retirement was funded. Christie said he did not need to make these promises to REACH in writing because he had demonstrated his devotion to REACH by donating large sums of money over the years.

The district court stated many times in its opinion that Christie was not credible. On this point in particular, the district court found:

> "There was nothing in the Loan Modification and Deed-in-Lieu Agreement or Special Warranty Deed in Lieu of Foreclosure that obligated Diversified (called the 'Lender') to pay or preserve the excess value of the property—known by Diversified at that time to be more than twice the outstanding balance of the mortgaged debt—for the benefit of REACH or its so-called in this case 'investors' or its ministries. Preserving the excess value for REACH was the farthest thing from Diversified's intent and scheme at that time. It was not consideration for the deed in lieu of foreclosure. Those altruistic recitals after the fact lack persuasive value or any credibility."

Diversified asserts that the district court erred in its credibility assessment because there was uncontroverted evidence that he was an honest person. Diversified cites testimony from McElvain in which he described Christie as a generous and trustworthy person. Diversified also cites testimony from Cory Lagerstrom, a trustee of REACH in the Village, to the same effect. There are a couple of problems with Diversified's argument. First, a trial court is not bound to believe a witness' testimony when that testimony is not directly contradicted. This is because "the trier of fact is the sole judge of the credibility of a witness." *Beard v. Montgomery Ward & Co.*, 215 Kan. 343, 348, 524 P.2d 1159 (1974). The fact-finder "is not obliged to accept and give effect to evidence which, in its honest opinion, is unreliable, even though such evidence is uncontradicted." *Schroeder v. Richardson*, 196 Kan. 363, 369, 411 P.2d 670 (1966). This court cannot reweigh witness credibility. *Geer*, 309 Kan. at 191. There is no indication or argument that the district court arbitrarily or capriciously refused to consider any witness' testimony. Accordingly, the district court's credibility determination cannot be disturbed.

Second, Christie's motive does not explain why Diversified was justified in tortiously interfering with Karbank's right of first refusal. As the district court found: "A simple foreclosure would have been to the advantage of REACH (obtaining the likely over payment from a Sheriff's sale) but Diversified would lose control of the proceeds belonging to REACH." Diversified's decision to avoid foreclosure resulted in REACH receiving zero equity and a gratuitous, legally unenforceable promise from Christie and Diversified receiving a significant amount of equity in the Property.

What are Karbank's interests with which Diversified's conduct interfered?

The interest at issue was Karbank's right of first refusal. Had Karbank been permitted to exercise that right, then it would have been able to acquire the Property for the same price that Diversified paid. The district court stated that "Diversified secretly obtained the sale . . . in an effort to defeat Karbank's interest." It is undisputed that Karbank had a right of first refusal agreement with REACH, and for reasons we have already discussed, there is substantial competent evidence to support the district court's finding that Diversified's actions interfered with that interest.

What interests were sought to be advanced by Diversified?

On this point, the district court noted that Diversified claimed to have an altruistic intent. But the district court did not find Christie to be credible, stating that what Diversified really sought was "full control and ownership of the equity in the REACH property . . . to the exclusion of all others." In particular, the district court found that

> "Diversified took a limited interest in being repaid a loan balance of $912,444.84 and parlayed that to obtain the entire fee estate valued at $2 million for itself from REACH while inducing REACH to keep it secret and breach the legitimate contract expectations of Karbank without any persuasive or credible justification."

The district court's findings under this factor are similar to its findings on Diversified's motive. Diversified's only legal interest in this case was being repaid its loan balance. Diversified claimed it was advancing REACH's interests by buying the Property for a steeply discounted price and divesting REACH of the equity in the Property, but the district court did not find this claim to be credible.

What are the social interests in protecting the freedom of action of Diversified and the contractual interests of Karbank?

The district court identified freedom of contract as an important social interest. Karbank exercised its right to contract by entering a fairly typical and uncomplicated right of first refusal agreement. Under the agreement, Diversified should have had the right to step into the shoes of any proposed buyer for the Property. Diversified interfered with Karbank's contractual rights by acquiring the Property without affording Karbank the benefit of its bargain. Again, the district court found that Diversified was "driven by the animus of its principal owner, David Christie, toward Karbank and by its own greed to the exclusion of all others including Karbank and REACH."

"Kansas courts have long recognized that, although freedom of contract 'is limited by other public policy and legislation . . . "the paramount public policy is that freedom to contract is not to be interfered with lightly."' [Citations omitted.]" *First Security Bank v. Buehne*, 314 Kan. 507, 511, 501 P.3d 362 (2021). Diversified interprets the district court's decision as requiring it to foreclose on the Property rather than accepting a deed in lieu of foreclosure. Diversified argues that "[r]equiring Diversified to foreclose its Mortgage to 'justifiably' exercise its superior Mortgage rights sets a dangerous precedent" because "Kansas lenders will foreclose in all instances—even when the borrower does not contest the foreclosure." According to Diversified, this process will flood the courts with needless mortgage foreclosure lawsuits and cause litigants to incur unnecessary fees.

Diversified believes that "[p]ublic policy supports settlements of disputes through loan restructurings rather than judicial foreclosure."

The district court recognized the importance of freedom of contract. But Diversified incorrectly asserts that the district court's decision requires foreclosures in all mortgage actions. Diversified did not have to foreclose. There would not have been a problem with Diversified accepting the deed in lieu of foreclosure had Karbank been notified of the transfer and received the same opportunity to acquire the Property by paying the loan balance. Diversified's argument to the contrary is not persuasive.

What is the proximity or remoteness of Diversified's conduct to the interference?

The district court found that it was "entirely the action of Diversified that has initiated and caused the interference of Karbank's contract rights." No other party induced REACH to breach its contract with Karbank. The district court found that Diversified, through Christie, exploited McElvain's absence and persuaded REACH to give Diversified the deed in lieu of foreclosure in exchange for forgiveness of the loan balance. These actions allowed Diversified to acquire the Property for substantially less than its market value, all to the detriment of Karbank's right of first refusal. As we have already discussed, these findings are supported by substantial competent evidence and turn mainly on credibility determinations made by the district court.

What are the relations between Karbank and Diversified?

The district court described the relations between Karbank and Diversified as follows: "Not good. Less than civil. The animus of Diversified's owner and manager, David Christie, has permeated this entire case." Christie "saw that Karbank stood to gain the property through the right of first refusal and has done everything possible to frustrate that right that Karbank had secured from REACH." The district court noted that Christie "said he would do anything to keep Karbank from ever owning the property." The district court found that Diversified, through Christie, acted without credible or persuasive justification and maliciously interfered with Karbank's contract expectations.

Diversified argues that the district court took Christie's statement that Karbank would never own the Property out of context. During a deposition exchange, Christie said that Diversified would "never own" the Property. Christie explained at trial that when he made this statement, the Property was under contract to another entity for $2 million. Karbank had once declined an offer to buy the Property for $1.5 million, so Christie did not think Karbank would want to buy the Property for an even higher price. When the quote is read in context in the deposition transcript, it does seem like Christie merely believed that Karbank would not wind up owning the Property because another entity would buy it. But Christie also made it clear that he thought Karbank "[didn't] deserve" the Property because it was "greedy" and "predatory."

Diversified also cites the multiple sale offers it made to Karbank as evidence that Diversified did not act maliciously or intend harm to Karbank. For example, Diversified cites Christie's testimony that he offered the Property to Karbank for $1.5 million in October 2015. It also cites the May 2, 2016, letter from Christie to Karbank offering to sell the Property for $1.9 million. It also cites the July 1, 2016, letter from Christie to Karbank notifying Karbank of Pendev's offer to buy the Property for $2.1 million.

But these offers do not change the fact that Diversified induced REACH to keep the deed in lieu agreement a secret from Karbank. Christie assumed an enormous conflict of interest when he negotiated the loan modification agreement between REACH and Diversified. The result of the negotiations was Diversified acquiring the Property for half its fair market value and depriving REACH of its equity, all to the detriment of Karbank's right of first refusal. The district court's finding that Diversified acted with malice toward Karbank is supported by substantial competent evidence presented at the trial.

Conclusion

The district court's factual findings are supported by substantial competent evidence. The legal conclusion the district court drew from these facts—that Diversified's conduct was not justified—is also sound. None of Diversified's arguments to the contrary are convincing. Thus, we conclude the district court did not err in finding that Diversified tortiously interfered with the contract between Karbank and REACH.

DID THE DISTRICT COURT ERR IN PRECLUDING DIVERSIFIED FROM ASSERTING PRIORITY OVER KARBANK?

During the Karbank litigation, Diversified filed a mortgage foreclosure action against REACH. Diversified argues that the district court erred in the way it resolved the case. A review of the timeline of events is helpful. REACH bought the Property in 2012 and obtained a mortgage from Bank of Prairie Village. Diversified purchased the note and mortgage in November 2015. Diversified filed the deed in lieu of foreclosure in June 2016. Karbank sued REACH and Diversified in July 2016. After the district court granted partial summary judgment to Karbank on its claims, Diversified deeded the Property back to REACH and attempted to reinstate the $912,444.84 mortgage in May 2018. Two days later, REACH filed for bankruptcy to liquidate the property and pay back its creditors. The bankruptcy court dismissed REACH's case in November 2018 after finding that REACH did not file the case in good faith. Diversified then sued REACH in June 2019 to foreclose on its mortgage, and its case was consolidated with Karbank's.

Central to Diversified's argument was the idea that its original note and mortgage on the Property remained viable despite the deed in lieu to Diversified and the return deed to REACH. Because the mortgage existed before Karbank gained an interest in the Property through the right of first refusal agreement with REACH, Diversified claimed that it was entitled to priority in the proceeds of a foreclosure sale under the first in time, first in right principle. Diversified asked the district court to enter judgment against

REACH for $1,402,846 plus accruing interest which reflected the principal balance secured by the mortgage, insurance premiums, property taxes, and maintenance costs.

The district court found that Diversified could foreclose on the mortgage because REACH defaulted on the note. But the district court ruled that Diversified could not assert priority of its mortgage over Karbank's right of first refusal for two reasons. First, the district court found that the original mortgage merged with the deed and was extinguished when Diversified accepted the deed in lieu of foreclosure. Diversified's reinstated mortgage in May 2018 did not have priority over Karbank's interest in the Property. Second, the district court found that Diversified, through its conduct, was estopped from asserting priority over Karbank's interest in the Property.

The district court also cited equitable considerations to limit Diversified's recovery to $912,444.84—the amount due on the note when Diversified accepted the deed in lieu of foreclosure. The district court found that any claims beyond this amount were "solely the responsibility of Diversified through its efforts to defeat and injure Karbank's exercise of the right of first refusal." The district court reasoned "Diversified had a legal and equitable means available to recover the money rightfully owed by REACH without doing any injustice to Karbank or REACH." The district court found that Diversified could have exercised its foreclosure right and "more likely than not realized a handsome overpayment of proceeds solely for the benefit of REACH." Instead, Diversified "chose the inequitable and malicious route and got caught in the act." The district court refused to "award Diversified an interest in the property caused by and directly attributed to its own wrongdoing to the detriment of others."

Diversified challenges each of these holdings by the district court.

Did the mortgage on the Property merge with the fee estate when Diversified accepted the deed in lieu of foreclosure from REACH?

The district court ruled that "[t]he priority of Diversified against Karbank was lost in 2016 when the mortgage disappeared as between REACH and Diversified and Diversified became the owner of the property subject to the Karbank right of first refusal." The district court applied the merger doctrine in reaching its conclusion. Diversified asserts that the mortgage did not merge with the title when REACH conveyed the Property to it because Diversified and REACH expressly agreed there was no merger and Diversified's foreclosure rights would not be impaired by the conveyance.

"The doctrine of merger provides that when a deed is delivered and accepted to fulfill a contract of conveyance, the contract is presumed to merge into the deed." *Unified Government of Wyandotte County/Kansas City v. Trans World Transp. Services, L.L.C.*, 43 Kan. App. 2d 487, 493, 227 P.3d 992 (2010). "The merger blends the rights of a creditor and debtor, resulting in the extinguishment of the creditor's right to collect a prior debt." *Blair Construction, Inc. v. McBeth*, 273 Kan. 679, 686, 44 P.3d 1244 (2002). But "[m]erger is not absolute . . . and whether merger occurs ultimately depends upon the intention of the parties." 273 Kan. at 686. The parties' "[i]ntent is a question of fact to be determined from examining the instruments and from the facts and circumstances surrounding their execution." 273 Kan. at 686.

The Loan Modification and Deed-in-Lieu Agreement between REACH and Diversified extended the maturity date of the loan and provided for conveyance of the Property upon default. If REACH defaulted, it was required to provide a special warranty deed to the Property to Diversified and in exchange Diversified was required to release REACH "from all of [REACH]'s liabilities arising under the Loan." REACH did default, and it conveyed the Property to Diversified via a special warranty deed. The question is whether Diversified's mortgage merged with the legal title to the Property.

The district court discussed the purpose of a mortgage, which "is to insure the payment of the debt for which it stands as security." *MetLife Home Loans v. Hansen*, 48 Kan. App. 2d 213, Syl. ¶ 1, 286 P.3d 1150 (2012). It also noted the principle that under Kansas law, the mortgage follows the note. *Bank of America, N.A. v. Inda*, 48 Kan. App. 2d 658, 667, 303 P.3d 696 (2013); *Kurtz v. Sponable*, 6 Kan. 395, 397, 1870 WL 495 (1870) ("Under our laws, the mortgage is but appurtenant to the debt; a mere security; and under ordinary circumstances, whoever owns the debt, owns the mortgage."). Finally, the district court discussed the doctrine of merger. This "theory holds that when a mortgagee's interest and a fee title become owned by the same person, the lesser estate, the mortgage, merges into the greater, the fee, and is extinguished unless the holder intends a contrary result." Restatement (Third) of Property (Mortgages) § 8.5, cmt. a (1997).

The district court then reviewed the evidence to determine whether REACH and Diversified intended for the mortgage to merge into the title. The district court found that "when Diversified accepted and filed the Special Warranty Deed in Lieu of Foreclosure there was no further debt or obligation of REACH under the note and the mortgage and all assignments became void." At that time, the district court believed, Diversified had a statutory obligation under K.S.A. 58-2309a(a) to release the mortgage of record. Because the note was satisfied, which the district court stated occurred the moment Diversified accepted the deed in lieu of foreclosure, the district court found that Diversified lost its priority over Karbank. As additional evidence of the parties' intent, the district court noted that none of Diversified's offers to sell the Property to third parties like Pendev mentioned that the Property was still encumbered by a mortgage. Instead, Diversified contracted for fee simple title to be sold to those entities.

Diversified disagrees that it intended to merge the mortgage with the title when it accepted the deed in lieu of foreclosure. Diversified asserts that there is a distinction between a debt and a mortgagor's personal liability for a debt. Diversified claims that it agreed to release REACH's personal liability for the debt but that it did not intend to extinguish the debt itself as satisfied. As evidence of its intent, Diversified cites an explicit statement of nonmerger in the Special Warranty Deed in Lieu of Foreclosure:

> "Nothing contained herein shall impair the rights of Lender as holder of the Note and Mortgage to foreclose, sell or otherwise proceed against the real estate and no merger of the fee estate conveyed here with the title and security interest shall occur until an instrument effecting such merger is filed of record."

The idea proposed by Diversified that a party can be released from personal liability for a debt without the debt being satisfied is supported by Kansas caselaw. See *Korb v. Minneapolis Threshing Mach. Co.*, 133 Kan. 783, Syl. ¶ 2, 3 P.2d 502 (1931) ("The debt and the liability of the mortgagor are not the same thing in law, and the mortgage is not discharged if it is the intention of the parties merely to release the mortgagor from personal liability and not to extinguish the debt."); *James v. Williams*, 102 Kan. 231, 232, 169 P. 1163 (1918) ("For the purpose of accomplishing an equitable result, a mortgage lien may be kept alive and enforced after the lien claimant has placed himself in a position which precludes him from resorting to the personal obligation of the mortgagor or anyone else for satisfaction of the debt."). In *Kansas Seventh Day Adventist Conference Ass'n v. Williams*, 156 Kan. 555, 134 P.2d 626 (1943), the Kansas Supreme Court addressed intent in the context of debt cancellation:

> "It would unduly extend this opinion to review cases dealing with varied facts and circumstances to be considered in arriving at the mortgagee's intent. One such fact frequently considered is cancellation of the debt and release of the mortgage. There is a marked conflict of authority as to whether such release operates to effect a merger and abandonment of the lien. It is said that the weight of authority is that such release of the mortgage does not necessarily effect a merger, though there are many decisions to the contrary. Clearly, however, while release of the mortgage is not conclusive, it is evidentiary in character, on the question of the mortgagee's intent. In many cases the fact

> that the mortgage was not released has been noted as indicating the mortgagee's intention not to abandon his lien. [Citations omitted.]" 156 Kan. at 558.

Thus, when Diversified accepted the deed from REACH and released REACH from its debt obligation, it did not necessarily mean that the mortgage was satisfied. If the mortgage was still valid, then Diversified did not have a statutory obligation to release the mortgage of record. The Loan Modification and Deed-In-Lieu Agreement does not state that Diversified is releasing the mortgage. Instead, it states that upon receiving the deed to the Property from REACH, Diversified would release REACH from its liabilities arising under the loan. This language aligns with Diversified's assertion that it merely released REACH from personal liability from the debt.

The clearest evidence of intent arises from the express statement in the Special Warranty Deed in Lieu of Foreclosure which says that the parties do not intend merger. The district court did not address this evidence, and instead focused on the facts that it believed showed an implied merger. While under ordinary circumstances a mortgage merges into the fee title when the mortgagee's interest and fee title are owned by the same person, this doctrine does not apply when the holder intends a contrary result. Restatement (Third) of Property (Mortgages) § 8.5, cmt. a. This express statement of intent in the deed supports Diversified's argument that it intended a contrary result. See 55 Am. Jur. 2d, Mortgages § 1161 ("It is the expressed intention at the time of the transaction that is controlling in determining whether a mortgage and fee title merge when the holder of the mortgage becomes the owner of the fee."); *The Reserve at Heritage Village Ass'n v. Warren Financial Acquisition, LLC*, 305 Mich. App. 92, 108, 850 N.W.2d 649 (2014) ("Although generally the fee and the mortgage merge, the covenant deed expressly provided that it was 'without merger.' This intent, expressed at the time of the transaction, is controlling. Given this express intention, whether nonmerger was to the benefit of Warren is 'immaterial.' [Citations omitted.]"); *Riggs v. Kellner*, 716 S.W.2d 3, 5 (Mo. App. 1986) ("Where the intention is expressly stated it shall be controlling."); *Commercial Merchants Nat. Bank & Trust Co. of Peoria v. Le Tourneau*, 137 F.2d 87, 89 (7th Cir. 1943) ("Our conclusion is that the parties could and did avoid the effect of a merger by their express agreement not to effect a merger.").

Even though Diversified expressly intended to keep the mortgage alive, the district court was not compelled to find nonmerger. This is because "all actions to foreclose mortgages are equitable in nature." *Hill v. Hill*, 185 Kan. 389, 400, 345 P.2d 1015 (1959). Where a finding of nonmerger would inequitably affect the rights of third parties, courts have declined to follow express intentions. Though it does not appear that there are any Kansas cases that have explored this general equitable exception, the Michigan Court of Appeals addressed it in *The Reserve at Heritage Village Ass'n*, 305 Mich. App. 92.

The Reserve at Heritage Village Association (plaintiff) was a condominium complex with 205 units. Winnick Heritage Village LLC (Winnick) acquired fee title to 150 of the units from Heritage Village Single Family Inc. (HVSF). Fifth Third Bank acquired a mortgage on 76 of the 150 units. Fifth Third Bank assigned the mortgage to Warren Financial Acquisition LLC (Warren). Winnick then conveyed the 76 units to Warren by covenant deed, which expressly stated that the transfer was without merger of the mortgage. Plaintiff recorded a lien for unpaid condominium assessments against Warren. Plaintiff then filed a lawsuit seeking to foreclose on its lien for the unpaid assets. In response, Warren assigned the mortgage to Reserve Mortgage Holding LLC (Reserve). Reserve then commenced foreclosure proceedings and purchased the 76 units by sheriff's deed. Reserve intervened in the lawsuit and sought a declaratory judgment to quiet title. Reserve argued that its foreclosure extinguished the plaintiff's encumbrance.

The district court found that the parties intended to keep the mortgage alive. The district court ruled that equity did not require it to reject the express intent of the parties because "at the time of the conveyance from Winnick to Warren there were no assessments due" and thus "at the time of the conveyance containing the nonmerger clause, the nonmerger had no effect on the rights of third parties." 305 Mich. App. at 101. The district court also noted that "plaintiff's position was made no worse by the nonmerger because, before the conveyance from Winnick to Warren, Warren held a mortgage and could have foreclosed at any time." 305 Mich. App. at 101. Plaintiff appealed, arguing that Warren was "seeking to protect itself from having to pay its own debt, the equities demand[ed] finding a merger, and the rationale and purposes of the antimerger exception d[id] not apply." 305 Mich. App. at 104.

The Michigan Court of Appeals reversed the district court and found that merger occurred despite the parties' express intentions. 305 Mich. App. at 105-10. The appeals court focused on two things—how nonmerger benefitted Warren and how nonmerger impacted third parties. When nonmerger was found, it was typically "'to allow a mortgagee/lender to protect itself from the claims of junior lienholders of the mortgagor/borrower.'" 305 Mich. App. at 107 (quoting *United States Leather, Inc. v. Mitchell Manufacturing Group, Inc.*, 276 F.3d 782, 787 [6th Cir. 2002]). Where a party is not acting to protect its interest in the presence of claims by junior lienholders for debts incurred by the mortgagor but is acting to protect itself from the claims of its own creditors, the rationale of nonmerger is not satisfied. 305 Mich. App. at 107. The appeals court held that Warren was "not seeking to protect itself from the claims of junior lienholders for debts incurred by Winnick." 305 Mich. App. at 108.

The appeals court next rejected the district court's finding that nonmerger did not affect a third party. 305 Mich. App. at 109. It held the district court took too limited of an approach when it only looked at the impact on third parties at the time of the transaction because "the time for considering the effect on a third party is not limited to the time of the transaction." 305 Mich. App. at 109. Thus, although the "plaintiff did not obtain a lien for the unpaid condominium assessments until after the conveyance containing the nonmerger clause" the plaintiff was still "a third party affected by the nonmerger." 305 Mich. App. at 109. The appeals court concluded that "despite the express intent to keep the mortgage alive, there was a merger of the mortgage and the fee title because a finding of nonmerger would affect the rights of plaintiff." 305 Mich. App. at 109.

For similar reasons, the district court here did not err in dismissing the express intent of Diversified to keep the mortgage alive. Diversified was not acting to protect itself from junior lienholders of REACH which may have supported a finding of nonmerger. As the district court noted, "[t]he efforts of Diversified, as mentioned throughout this decision, were for the purpose of undermining and interfering with Karbank's right of first refusal contracted between Karbank and REACH, solely for Diversified's self-serving benefit." Additionally, Karbank's rights would be harmed by finding nonmerger. The district court found that allowing Diversified to assert priority would "leav[e] Karbank with no remedy."

Though the district court's opinion was not as nuanced as the Michigan Court of Appeals' decision in *The Reserve*, the same principles support the district court's finding of merger. The rationale supporting nonmerger—protecting a party from junior lienholders or creditors of the mortgagor—does not apply here. Diversified's assertion that the mortgage did not merge with the title is made for the purpose of defeating any remedy Karbank may seek in this case. Equitable considerations support the district court's finding that the mortgage on the Property merged with the fee estate when Diversified accepted the deed in lieu of foreclosure from REACH.

Did the district court err in finding that Diversified was estopped from asserting priority on the mortgage?

The district court also ruled that Diversified was estopped from asserting priority on its mortgage. The district court did not expand very much on this point in its memorandum decision, but in an earlier decision the court ruled that there were "exceptions to the first in time, first in right analysis, specifically including where the mortgagee, through its acts and conduct, has estopped itself from being able to assert priority." See *Golden Belt Lbr. Co. v. Klinzman*, 138 Kan. 877, 879, 28 P.2d 736 (1934) ("[I]t has been held that purchase-money mortgages are subordinate to liens for improvements authorized by the mortgagee or done with his knowledge and consent, or where, by his acts and conduct, he has estopped himself to assert priority.").

Diversified argues that equitable estoppel did not apply under these facts. Karbank merely states that the district court's decision is supported by substantial competent evidence. Equitable estoppel has been described as:

> "[T]he effect of the voluntary conduct of a party whereby it is precluded, both at law and in equity, from asserting rights against another person relying on such conduct. A party seeking to invoke equitable estoppel must show that the acts, representations, admissions, or silence of another party (when it had a duty to speak) induced the first party to believe certain facts existed. There must also be a showing the first party rightfully relied and acted upon such belief and would now be prejudiced if the other party were permitted to deny the existence of such facts. There can be no equitable estoppel if any essential element thereof is lacking or is not satisfactorily proved." *Gillespie v. Seymour*, 250 Kan. 123, 129-30, 823 P.2d 782 (1991).

With that said, the "'hallmark of the doctrine is its flexible application'" and "[c]ourts should be cognizant of the policies animating the doctrine and abstain from applying it in a formulaic manner. [Citation omitted.]" *Steckline Communications, Inc. v. Journal Broadcast Group of Kansas, Inc.*, 305 Kan. 761, 770, 388 P.3d 84 (2017). Application of equitable estoppel "must depend on its own facts." *Fleetwood Enterprises, Inc. v. Coleman Co., Inc.*, 37 Kan. App. 2d 850, 865, 161 P.3d 765 (2007); see also 28 Am. Jur. 2d, Estoppel and Waiver § 27 (defining estoppel but then observing that the doctrine "rests upon the facts and circumstances of the particular case in which it is urged, considered in the framework of the elements, requisites, and grounds of equitable estoppel, and consequently, any attempted definition usually amounts to no more than a declaration of an estoppel under those facts and circumstances").

Here, there is evidence supporting the idea that Diversified had a duty to speak when it entered the deed in lieu agreement. Though it was only REACH's contractual duty to inform Karbank of a potential sale under the right of first refusal agreement, Diversified was aware of Karbank's right of first refusal. The district court noted that "[w]hen this lawsuit began REACH and Diversified were . . . joined at the hip with the same interests." The district court also found that "uncontroverted evidence show[ed] that Diversified knew of Karbank's First Rights Agreement but proceeded anyway." Under these facts, Diversified's silence could be considered unjustified. Diversified's silence induced Karbank into believing that the Property was not for sale, and Karbank was therefore not aware of its ability to exercise its right of first refusal.

Diversified argues that there was no evidence that Karbank was misled concerning the mortgage's priority. Diversified says that Karbank knew that there was a mortgage on the Property and that REACH's lender could foreclose. Because Karbank bargained in the shadow of a preexisting mortgage, Diversified argues, Karbank could not have been misled about the mortgage's priority.

Diversified's argument that Karbank knew that the lender could foreclose on its mortgage is unpersuasive. Had Diversified foreclosed on the mortgage, this dispute would not be before the court. Instead, Diversified took a strategy that prevented Karbank from asserting its right of first refusal so Diversified could gain the equity in the Property for itself. Had Diversified foreclosed, the equity in the Property would have belonged to REACH. Karbank bargained for the thing that Diversified took for itself, which was equity in the Property in the event of a favorable deal.

The other element of equitable estoppel is that Karbank had to rely on Diversified's silence and act on it. *Gillespie*, 250 Kan. at 129; *Bank of Blue Valley v. Plaza Media, Inc.*, No. 92,937, 2006 WL 2806613, at *6 (Kan. App. 2006) (unpublished opinion) ("Under Kansas law, a party seeking to take advantage of estoppel must show that as a consequence of the representation at issue, the party acted as it would not otherwise have done."). Here, Diversified's silence caused Karbank to act as it otherwise would not have done. Had Karbank been aware of the sale, it could have asserted its rights under the right of first refusal agreement. Given the flexible, fact-based nature of equitable estoppel, it cannot be said that the district court erred in applying the doctrine.

Did the district court err in limiting the amount of Diversified's recovery in the mortgage foreclosure action?

In its mortgage foreclosure action, Diversified requested the amount due on the note plus accrued interest and expenses through April 30, 2019, for a total amount of $1,402,846, plus interest accruing after that date. By trial, Diversified's request had risen to $1,637,743.41. The district court limited Diversified's recovery on the note to $912,444.84—the amount owing when Diversified accepted the deed in lieu of foreclosure. The district court explained that "[e]very other expense, interest, or claim under the mortgage that has accrued since that time has been solely caused by the fault and bad faith dealing of Diversified in its driving desire to defeat Karbank's interests." The district court found that by engaging in tortious conduct, Diversified caused the damages that exceeded $912,444.84.

On appeal, Diversified merely asserts that it "presented uncontroverted trial evidence that the amount due under the Note through trial is $1,637,743.41." Our review of the district court's decision does not reveal any obvious error. As stated above, "actions to foreclose mortgages are equitable in nature." *Hill*, 185 Kan. at 400. Though the district court did not explicitly use the term, it appears the court was applying the clean hands doctrine in limiting Diversified's recovery. "The clean hands doctrine is based upon the maxim of equity that he who comes into equity must come with clean hands." *Green v. Higgins*, 217 Kan. 217, 220, 535 P.2d 446 (1975). The doctrine "provides that no person can obtain affirmative relief in equity with respect to a transaction in which he has, himself, been guilty of inequitable conduct." 217 Kan. at 220. For the doctrine to apply, there must be "willful conduct which is fraudulent, illegal or unconscionable" and "the objectionable misconduct must bear an immediate relation to the subject-matter of the suit and in some measure affect the equitable relations subsisting between the parties to the litigation and arising out of the transaction." 217 Kan. at 221. Application of the clean hands doctrine is within the sound discretion of the district court. 217 Kan. at 220.

Here, the district court did not abuse its discretion in limiting Diversified's recovery under the note to $912,444.84. Diversified's total claim includes accrued interest, insurance premiums, property taxes, and maintenance costs, all incurred by Diversified after it accepted the deed in lieu of foreclosure. Diversified could have avoided the expenses it claimed beyond that loan balance, but it chose to tortiously interfere with Karbank's contractual rights. The district court's reasoning is sound and supports application of the clean hands doctrine. We conclude the district court did not err in limiting Diversified's recovery in the mortgage foreclosure action.

DID THE DISTRICT COURT ERR IN AWARDING DAMAGES TO KARBANK?

REACH and Diversified raise several challenges to the district court's determination of damages. For Karbank's breach of contract claim against REACH, the district court awarded Karbank the difference between the Property's value of $2,000,000 and the amount Karbank would have had to pay to exercise its first refusal rights, $912,444.84, for a total of $1,087,555.16. The district court awarded the same judgment against Diversified for tortious interference with contract. The district court also awarded Karbank attorney fees against both defendants. On appeal, REACH and Diversified both challenge the attorney fee award but on different grounds. REACH and Diversified focus their arguments on their assertion that the district court erred by awarding duplicative damages for the same wrong or loss.

A determination of whether the district court applied the correct measure of damages is a question of law, over which an appellate court has unlimited review. *Peterson v. Ferrell*, 302 Kan. 99, 106, 349 P.3d 1269 (2015). "Generally speaking, when awarding contract damages, the goal is to put the nonbreaching party in the position he or she would have been in had the breach never occurred. [Citation omitted.]" 302 Kan. at 106. Similarly, the purpose of awarding damages for an injury caused by a tort is to make a party whole by restoring the party to the position the party was in before the injury. *Burnett v. Eubanks*, 308 Kan. 838, 857, 425 P.3d 343 (2018).

Award of attorney fees

We will begin by briefly addressing the award of attorney fees. At trial, Karbank presented evidence that it incurred $448,419.64 in attorney fees litigating the case against REACH and Diversified and in defending the bankruptcy matter. The district court found that the reasonable attorney fees related to Karbank's prosecution of the breach of contract claim against REACH were $200,000. It ordered each defendant to pay half that amount. The district court also found the reasonable attorney fees related to Karbank's defense in the bankruptcy matter to be $61,419.27, and it ordered Diversified to pay those fees. Thus, the district court assessed $100,000 in attorney fees against REACH and $161,419.27 in attorney fees against Diversified.

The issue of the district court's authority to award attorney fees is a question of law over which appellate review is unlimited. *In re Estate of Oroke*, 310 Kan. 305, 317, 445 P.3d 742 (2019). Where the district court has authority to grant attorney fees, the amount awarded is reviewed under an abuse of discretion standard. *Schmidt v. Trademark, Inc.*, 315 Kan. 196, 208, 506 P.3d 267 (2022).

In deciding the reasonableness of an attorney fee, the eight factors set forth in Rule 1.5(a) (2023 Kan. S. Ct. R. at 333) of the Kansas Rules of Professional Conduct (KRPC) should be considered. *Oroke*, 310 Kan. at 319. The district court is an expert in the area of attorney fees and can draw on and apply its own knowledge and expertise in evaluating services rendered. An appellate court is also an expert on the reasonableness of attorney fees, but an appellate court should not substitute its judgment for that of the district court on the amount of the attorney fees awarded "unless 'in the interest of justice'" the appellate court disagrees with the district court. *Johnson v. Westhoff Sand Co.*, 281 Kan. 930, 940, 135 P.3d 1127 (2006).

REACH does not question the district court's authority to award attorney fees, as the right of first refusal contract contained a prevailing party attorney fees provision. But REACH claims the district court's award of attorney fees was arbitrary and unsupported by sufficient findings. REACH points out that the district court failed to conduct an analysis under KRPC 1.5(a) in determining the amount of attorney fees.

We share REACH's concern that the district court failed to conduct an analysis under KRPC 1.5(a) in awarding the attorney fees. Under many circumstances, this failure could be considered an abuse of discretion. But the problem with REACH's argument is that it never gave the district court the opportunity to make more detailed factual findings to support the attorney fee award. See *Tucker v. Hugoton Energy Corp.*, 253 Kan. 373, 378, 855 P.2d 929 (1993) ("[A] litigant must object to inadequate findings of fact and conclusions of law in order to give the trial court an opportunity to correct them."). Where a litigant fails to object to inadequate factual findings, "the trial court is presumed to have found all facts necessary to support the judgment." 253 Kan. at 378. But this court "may still consider a remand if the lack of specific findings precludes meaningful appellate review." *Gilkey v. State*, 31 Kan. App. 2d 77, 78, 60 P.3d 351 (2003).

We observe that the district judge in this case is an experienced trial judge, and he awarded Karbank only about half the attorney fees it requested. Given REACH's failure to object to the adequacy of the findings, we are unwilling to find that the district court abused its discretion in deciding the amount of attorney fees it assessed against REACH.

Diversified's only challenge to the attorney fee award is that the district court failed to identify its authority for assessing attorney fees against Diversified. Generally, attorney fees are only recoverable by the prevailing party in an action if authorized by statute or contract. But "when litigation with third parties is the natural, proximate consequence of a defendant's tortious conduct then the defendant is liable to the plaintiff for expenses generated in the third-party litigation." *Harder v. Foster*, 54 Kan. App. 2d 444, 464, 401 P.3d 1032 (2017); see also *Hawkinson v. Bennett* 265 Kan. 564, 575, 962 P.2d 445 (1998) (recognizing third-party litigation exception in Kansas). Because of Diversified's tortious conduct, Karbank needed to litigate its breach of contract claim against REACH in district court including litigation in the bankruptcy case.

Diversified does not challenge the application of the third-party litigation exception to these facts. Instead, it asserts that "the District Court never identified this exception as the basis for a fee award, and Karbank failed to preserve this argument." Diversified claims that Karbank did not raise the principle before trial or at trial and "[b]ecause the argument was not preserved, the Court of Appeals need not address it."

We disagree. The record reflects that the district court relied on the third-party litigation exception in assessing attorney fees against Diversified. Karbank's claim for attorney fees against Diversified was identified in the pretrial order. The attorney fees issue was also raised at trial. When Karbank was asked at trial about the amount of attorney fees Karbank incurred during the litigation, Diversified's attorney objected because there was not a statute or contract that supported awarding attorney fees to Karbank on the tortious interference claim. Karbank's attorney explained that the evidence was relevant because attorney fees could be awarded as an element of damages where a party is forced to litigate against others to defend its legal rights. The issue was preserved in district court, and the district court was authorized to award attorney fees against Diversified under the third-party litigation exception.

Did the district court err by permitting Karbank to recover duplicative damages?

REACH and Diversified focus their arguments on their assertion that the district court erred by awarding duplicative damages for the same wrong or loss. The district court found that Karbank was damaged in the amount of $1,087,555.16 when the right of first refusal contract was breached. The district court arrived at this number by subtracting the amount Karbank would have had to pay in exercise of its first refusal rights from the market value of the Property. The district court entered judgment in this amount against REACH for breach of contract and separately against Diversified for tortious interference with a contract.

When conduct can satisfy the elements of both a breach of contract and an independent tort, the tort must cause damages beyond those suffered as a result of the breach of contract. In other words, when the same conduct supports multiple causes of action for the same damages, multiple recoveries are not permitted. See *Ingram v. Howard-Needles-Tammen & Bergendoff*, 234 Kan. 289, 302-03, 672 P.2d 1083 (1983) (double recovery not permitted for same injury based on two theories); see also *Gregory v. Carey*, 246 Kan. 504, 513-14, 791 P.2d 1329 (1990) (duplicative damage award rejected where all alleged wrongs flowed from one act); *Allen, Gibbs & Houlik, L.C. v. Ralston*, No. 121,566, 2021 WL 5143772, at *15 (Kan. App. 2021) (unpublished opinion) ("[W]hen the same conduct forms the basis for multiple causes of action for the same damages, multiple recoveries are not permitted."); 25 C.J.S., Damages § 24 ("[D]ouble recovery is foreclosed by the rule that only one satisfaction may be obtained for a loss that is the subject of two or more judgments or committed by two or more defendants.").

REACH and Diversified argue that the district court erred by awarding duplicative damages against each defendant. But as the district court explained, the damages awarded against each defendant were for different liability. The damage award against REACH was for breach of contract—the right of first refusal agreement. The damage award against Diversified was for tortious interference with contract. REACH and Diversified fail to understand that Kansas law does not prohibit the district court from *awarding* duplicative damages against separate defendants based on different conduct and different theories of recovery. Kansas law only prohibits a party from *recovering* duplicative damages from separate defendants where the damages arise from the same injury or loss.

Kansas recognizes the one recovery rule where a plaintiff is only allowed one recovery from multiple defendants for a single wrong. *York v. InTrust Bank, N.A.*, 265 Kan. 271, 310-14, 962 P.2d 405 (1998). In *York*, Richard and Vesta York bought a residential lot from InTrust Bank N.A. (InTrust). There was a dispute over who would pay the realtors' commission. The Yorks incurred damages as a result of delays caused by the dispute, including increased mortgage interest, increased construction costs and contractors' fees, cost of temporary housing, and lost mortgage interest income tax deductions. The Yorks sued InTrust, the developer, two realtors, and others. The district court granted summary judgment to all defendants except InTrust, one realtor, and one developer. Before trial, the Yorks settled with the realtor and developer for $65,000 and granted them a covenant not to sue. The jury found against InTrust and awarded the Yorks $113,411 in actual damages and recommended punitive damages. The district court later granted the Yorks punitive damages of $7,500. Posttrial, the district court credited InTrust $65,000 from the settlement with the realtor and developer.

One issue on appeal was whether the district court erred in granting InTrust a pro tanto credit for the full amount received from the settlements with other defendants. In addressing this issue, the court explained:

> "Kansas has not varied from a rule that limits a plaintiff to only one recovery for a wrong. This rule has been applied throughout the years in situations where partial payments have been made by multiple tortfeasors. A pro tanto credit has been granted to prevent a plaintiff from receiving a double recovery." 265 Kan. at 311.

The court reviewed several cases consistent with these principles, including *Jacobsen v. Woerner*, 149 Kan. 598, 603, 89 P.2d 24 (1939) (stating that where a plaintiff is injured by a tortious act of which several persons are responsible, the injured person has a right of action against each tortfeasor, but should the plaintiff receive partial satisfaction from a tortfeasor the payment inures to the benefit of all and operates as a credit pro tanto). *York*, 265 Kan. at 311-12. Based on these principles, the *York* court concluded that the district court properly granted InTrust a pro tanto credit for settlement amounts paid by other defendants to the Yorks. 265 Kan. at 312-13. But the court held that pro tanto credit would not be allowed against punitive damages awarded to punish individual wrongdoers. 265 Kan. at 313-14. See also *Wright v. Bachmurski*, 29 Kan. App. 2d 595, 604-05, 29 P.3d 979 (2001) (applying one recovery rule and pro tanto credit in defamation action against multiple defendants).

Here, Karbank sustained a single wrong when it was denied its right of first refusal to buy the Property. Karbank's damages for this wrong was the difference between the fair market value of the Property and the amount for which Karbank could have purchased the Property had it been allowed to exercise its right of first refusal, plus attorney fees. When Karbank recovered these damages against REACH through the sheriff's sale of the Property, the judgment against Diversified should have been partially satisfied by the amount of Karbank's credit bid on the Property. Diversified requested this credit against its judgment during the confirmation of the sheriff's sale of the Property, but the district court denied the request. We find the district court's ruling was erroneous because it ultimately allowed Karbank to recover its damages twice against multiple defendants for the same wrong or loss in violation of the one recovery rule. Although most Kansas cases addressing the one recovery rule involve claims against multiple tortfeasors, we find that the same principle applies to Karbank's breach of contract claim against REACH and its tort claim against Diversified.

Karbank should not have been permitted to recover its base judgment against REACH for $1,087,555.16 and then been permitted to recover the judgment for the same amount against Diversified when the separate judgments arose from the same wrong or loss. The double recovery amounted to a windfall for Karbank. The district court should have granted Diversified's request to apply Karbank's $1,214,925.41 credit bid in the sheriff's sale of the Property to reduce its judgment against both REACH and Diversified. Although the record is unclear, it appears that this credit would have mostly satisfied Karbank's judgment against Diversified. As a result, Karbank's execution of its judgment against Diversified, including the sheriff's sale of Diversified's mortgage foreclosure judgment and the district court's confirmation of that sale, must be vacated and set aside.

Before closing, we observe that both REACH and Diversified have asserted that the district court erred by requiring them to indemnify Karbank for unpaid real estate taxes on the Property. The district court declined to award a specific amount to any of the parties but simply stated that "[t]he real estate taxes that became due and payable during the relevant time periods are the responsibility of the record owner of the property at that time." That party would have to indemnify and hold harmless any party that incurred losses as a result of the unpaid real estate taxes. It is unclear what effect this ruling has on the parties, and REACH and Diversified each devote one paragraph in their briefs on this subject. A point raised incidentally in a brief and not argued therein is waived and abandoned. *Russell v. May*, 306 Kan. 1058, 1089, 400 P.3d 647 (2017). This issue is not ripe in this appeal, but the district court may address the issue on remand if there is any controversy about liability for real estate taxes on the Property.

CONCLUSION AND REMAND ORDER

The district court's judgment for Karbank against REACH for breach of contract is affirmed. The district court's judgment for Karbank against Diversified for tortious interference with contract is affirmed. The district court's judgment limiting the amount of Diversified's mortgage foreclosure judgment against REACH and denying the mortgage lien priority over Karbank's judgment lien is affirmed. The district court did not err in awarding damages to Karbank, including attorney fees, but it erred by permitting Karbank to recover duplicative damages for the same wrong or loss. More specifically, the district court erred when it denied Diversified's request to apply Karbank's $1,214,925.41 credit bid in the sheriff's sale of the Property to reduce its judgment against both REACH and Diversified. As a result, Karbank's execution of its judgment against Diversified, including the sheriff's sale of Diversified's mortgage foreclosure judgment and the district court's confirmation of that sale, is vacated and set aside. Karbank's satisfaction of judgment against Diversified is also set aside. The case is remanded to the district court for further proceedings consistent with this opinion.

Affirmed in part, vacated in part, and remanded with directions.

* * *

ARNOLD-BURGER, C.J., dissenting: Because Regional Evangelical Alliances of Churches Inc. (REACH) was not bound by the right of first refusal agreement (ROFR) between REACH and Karbank Holdings LLC (Karbank) as it related to its promissory note and mortgage filed in September 2012, I must respectfully dissent from the majority finding to the contrary. I would find that REACH did not breach its contract with

Karbank. I need not address the other issues presented, because the foundational issue of the sale is dispositive. But this should not be interpreted as support for all the other issues decided by the majority—with the exception of its conclusion that the appeal is not barred by lack of standing or acquiescence and Karbank was not entitled to recover its damages twice against multiple defendants for the same wrong or loss in violation of the one recovery rule. Slip op. at 21, 67. I agree with those findings.

I. THE ISSUE IS WHETHER A LOAN MODIFICATION AGREEMENT BETWEEN A LENDER AND A BORROWER THAT INCLUDES THE ISSUANCE OF A DEED IN LIEU OF FORECLOSURE UPON DEFAULT CONSTITUTES A SALE FOR PURPOSES OF A RIGHT OF FIRST REFUSAL ENTERED BETWEEN THE BORROWER AND A THIRD PARTY WITHOUT THE LENDER'S APPROVAL

This case presents a very simple issue made to appear complicated by the irrelevant noise that is going on around it. The noise involves accusations, as it relates to the various roles held by David Christie, primary shareholder of Diversified Acquisitions LLC (Diversified) throughout this case and whether those actions were in good faith. Those accusations are countered by allegations that Karbank is a morally corrupt profiteer seeking to get a bargain and hold onto a windfall off the backs of trusting parishioners of a struggling church. But nothing suggests that Christie or Karbank acted illegally or contrary to any ethics code to which they were bound. And none of that bears on the simple issue of whether the contract between REACH and Karbank was breached. Who did what and for what reason is irrelevant to resolve this contract dispute.

II. THIS IS A MATTER OF FIRST IMPRESSION IN KANSAS

When appellate courts encounter a matter of first impression, as here, it means that there is a lack of controlling precedent in Kansas. Thus, the court must rely on persuasive authority or some other analytical technique to answer the question before it. See Black's Law Dictionary 266 (11th ed. 2019) (defining "case of first impression" as: "A case that presents the court with an issue of law that has not previously been decided by any controlling legal authority in that jurisdiction."); see also Lindquist and Cross, *Empirically Testing Dworkin's Chain Novel Theory: Studying the Path of Precedent*, 80 N.Y.U. L. Rev. 1156, 1179 (October 2005) ("A case of first impression is, by definition, one that presents a novel legal question and is not ruled by prior precedent."). It does not mean that we must analyze and either accept or reject every case from every state that may touch on the issue. It simply means that we may examine similar or identical cases from other jurisdictions for guidance. We may adopt the rationale of any we find persuasive or adopt an analysis unique to our state.

Unfortunately, from the briefing and my own independent research, there are not any cases that are directly akin to this one—or at least none I have located or are cited by the parties. This has not prevented the majority and the parties from citing lots of cases, but a close examination finds they either do not provide enough information to determine whether the facts align with those here, or the facts do not align and there is an attempt to force them to align. None of them involve what I believe to be the key element here: a right of first refusal entered without the signature and approval of the holder of a first priority promissory note and mortgage. So it is this court's responsibility not to try to make unsimilar precedent fit, but to determine what it believes the correct interpretation of the contract is under these facts and existing Kansas law.

III. OUR STANDARD OF REVIEW IS DE NOVO

Because the breach of contract issue was decided by summary judgment—and thus the facts are not in dispute—we are in just as good a position as the district court to rule on the issue based on the stipulated facts. And as properly set forth by the majority, we exercise unlimited review over the interpretation and legal effect of written instruments. We are not bound by the lower court's interpretations or rulings. *Trear v. Chamberlain*, 308 Kan. 932, 936, 425 P.3d 297 (2018). Likewise, since the issue of breach was decided by summary judgment, we review the legal effect of undisputed facts de novo. *GFTLenexa, LLC v. City of Lenexa*, 310 Kan. 976, 981-82, 453 P.3d 304 (2019).

So what are the facts, without the noise?

IV. THE RELEVANT, UNDISPUTED, FACTS ARE EXAMINED WITH A TIMELINE

- *September 2012: REACH and Prairie Village Bank execute a promissory note and mortgage.*

REACH bought the property located on Belinder, Prairie Village, Kansas (Property) for a total of $1,315,000 in September 2012. It financed $990,000 through a loan with Prairie Village Bank (Bank) secured by a mortgage. The down payment was made by unsecured loans given by several church donors. The loan and each of the individual promissory notes were scheduled to mature, basically by a balloon payment, in September 2015.

REACH agreed, as part of its contract with Bank to punctually pay all amounts due as well interest and pay all taxes on the Property, water, sewage, and any other assessments on the Property. REACH agreed not to permit any lien or encumbrance of any kind to become superior to the mortgage. REACH could not execute any lease on the Property that provided for the payment of rent for more than one month in advance without express consent in writing by Bank. And in the event of a default, all leases were to be assigned by REACH to Bank. If REACH defaulted, it was required to deposit money with Bank sufficient to cover all taxes and insurance. "Events of Default" under the agreement included a failure to pay amounts due when due, permitting any "conveyance, sale, assignment, transfer, lien, pledge, mortgage or other encumbrance or alienation of the Premises or any part thereof without the prior written consent of the [Bank]," abandoning the

Property, failure to maintain its legal existence, or any material change in REACH's business which impairs its ability to repay the debt. It also agreed that if it were in default, it would be responsible for any attorney fees incurred in collecting under the loan and mortgage agreements. REACH agreed that the Mortgage would be superior to any intervening lien or encumbrance. In fact, it agreed that it would not transfer, assign mortgage, or pledge any interest in the Property without the consent of Bank. It agreed that upon default, Bank could at its discretion, seek all unpaid balances immediately, foreclose (either judicially or nonjudicially) on the Property, sell the Property, sue for damages, take full possession of the Property, or take any other action it deemed necessary. REACH recognized that Bank could sell and assign the note as long as it gave REACH 15 days' notice. It did not give REACH any right to challenge that assignment.

The promissory note and mortgage were filed with the Johnson County Register of Deeds in September 2012, putting all subsequent interest holders on notice of its terms.

- *March-May 2015: Reverend McElvain becomes ill and Karbank obtains title report on Property.*

In early spring 2015, Reverend Craig McElvain, the executive director of REACH became critically ill. In the Spring and Summer of 2015 he spent much of his time in a hospital intensive care unit, unable to govern church business. At about the same time, Karbank had a title search done on the Property and learned that there was a note and mortgage attached to the Property by Bank. Although Karbank would have been considered aware of the terms of the note and mortgage based on the September 2012 filing, this established that it was in fact aware of the terms.

It knew that REACH could not encumber the Property without the Bank's permission. It also understood that three years earlier, in the promissory note and mortgage, REACH had conveyed all right, title, and interest it had in the Property to Bank. And it understood that if REACH failed to meet any of the conditions of the note and mortgage, it would be a breach of that agreement. And most importantly, it understood that the mortgage and note were superior to any other agreement entered after the date of the mortgage. And finally, it also understood that Bank could assign the note and mortgage.

- *July 2015: REACH enters contract with Karbank without Bank approval.*

Almost three years after a first in priority purchase money note and mortgage was attached to this Property, Karbank entered into a lease and a contract establishing a right of first refusal with REACH. Bank was not a party to either agreement. Diversified was not a party to either agreement. It provided, as it applies to these facts:

1. If REACH "desires to enter into a contract or any other understanding to sell the Property," it must tell Karbank the terms and conditions under which it would sell through a Purchase Offer Notice. It must include a proposed sale price, form of payment, earnest money, proposed closing date, description of any mortgage financing that the sale would be subject to, the latest "'as built'" survey of Property and commitment to purchase title insurance. After 30 days if there is no agreement on price, the first right is deemed waived as to that offer.

2. If REACH receives an offer on the Property, it must notify Karbank and give it a copy of the contract with a certificate of authenticity as to the contract. The right is waived if not exercised in 30 days.

3. All notices and communications must be in writing.

The term "sell" was not defined.

- *September 2015: REACH is in default.*

REACH failed to pay the balance due on the note. Bank sent a demand letter to REACH indicating that it was not going to renew the note because the church was closed. Bank revealed its hesitancy to foreclose on a church and regulatory issues it was facing. No other Bank was willing to take over the debt, so Bank entered negotiations with Diversified to buy the note and mortgage.

- *October 2015: REACH notifies Karbank that it will sell Property for $1.5 million.*

In October 2015, before the Bank sold the note to Diversified, Christie notified Karbank, on behalf of REACH—consistent with the first right of negotiation—that REACH was wanting to sell the Property and was preparing to list it. He told Karbank that it could buy it for $1.5 million. That would be enough money to satisfy the note, expenses, and the investors that put down the down payment. Karbank initiated discussions with an architect and the city, toured the Property, and discussed early termination of existing leases on the Property (a Montessori school was renting space) but failed to respond to REACH's oral offer. Apparently, since the offer was not in writing and it did not come directly from REACH, they did not believe they had any duty to respond. Although Steve Karbank conceded that he did know that Christie was the point man for REACH. But Karbank does not claim in its petition that the right of first negotiation was breached by this action.

- *November 1, 2015: REACH enters brokerage agreement with Christie Development Associates LLC to sell Property.*

On November 1, 2015, Christie Development Associates LLC entered a brokerage agreement with REACH to list the property for $1.5 million and placed a for sale sign on the property. The brokerage agreement was to run until February 2017. So Christie Development Associates LLC was the proper party to extend offers on behalf of REACH at least until Diversified obtained and filed the deed in lieu of foreclosure. They put a for sale sign on the Property.

- *November 4, 2015: Karbank files the Lease and ROFR with the Register of Deeds.*

Karbank files its lease and ROFR with the Register of Deeds on November 4, 2015. By this point, Karbank, was well aware of the financial situation facing REACH. It was also aware, through its examination of the mortgage and loan documents, that the mere entering into the lease with REACH would have been a basis for Bank to find REACH in default.

- *November 6, 2015: Notice of future assignment from Bank to Diversified.*

Bank gave proper and sufficient notice to REACH that it planned to assign the loan to Diversified.

- *December 2015: Diversified purchases note and mortgage.*

Because of failure to make payments, at the time Diversified acquired Bank's interest, in December 2015, the balance due on the note was approximately $909,000. And that is what Diversified paid Bank. So by late December 2015, Diversified owned a purchase money note and mortgage with REACH as the borrower. Diversified had purchased the loan and attendant mortgage from Bank and had all the same rights and responsibilities as Prairie Village Bank had under the loan and mortgage agreement. The assignment was filed with the Register of Deeds on January 27, 2016. REACH was still the title holder. Each month thereafter, the debt was increasing.

- *December 2015: REACH enters loan modification agreement with Diversified.*

Diversified, now the owner of the note and mortgage, negotiated a loan modification with REACH. First, the parties agreed to extend the maturity date to May 1, 2016. REACH also agreed that if it could not pay all amounts due by May 1, 2016, REACH would provide its lender, Diversified, with a deed in lieu of foreclosure. The hope was REACH could come up with a buyer and it could pay off the note and make enough money to pay off the parishioners who fronted the down payment. As a result, the loan modification gave broker, Christie Development Associates, the authority to seek to market the Property on behalf of REACH and consistent with the terms it desired—to sell to another religious institution.

Christie immediately tried to sell the Property on behalf of REACH. In early 2016, Karbank had another conversation with Christie that the church wanted to sell the Property to another church.

- *May 1, 2016: REACH is in default.*

By May 1, it became apparent REACH was in default. It had been unable to sell the Property to another church or pay the money owing. So Diversified put it on the open market before exercising its right to accept and file the deed in lieu of foreclosure.

- *May 2, 2016: REACH offers Property to Karbank for $1.9 million.*

On May 2, 2016, Christie Development Associates (still the broker on the Property on behalf of REACH) sent Karbank a notice of a contract on the Property for $1.9 million. It was in writing and appeared to comply with all the requirements of the ROFR. But, according to its petition, Karbank did not believe it needed to respond because "Diversified Acquisitions had no standing to extend an offer to sell." It is unclear what offer was made by Diversified Acquisitions. The offer was made by Christie Development Associates, the entity with the brokerage contract for the Property. In any event, Karbank did not only not timely respond to the offer, but it failed to respond at all. It does not allege in its petition that the form of the May 2, 2016 offer was a breach of the ROFR.

- *June 17, 2016: Deed in lieu of foreclosure filed.*

Diversified filed the deed in lieu of foreclosure with the Register of Deeds on June 17, 2016.

- *July 1, 2016: Diversified offers Property to Karbank for $2.1 million.*

Christie Development Associates sent another letter to Karbank July 1, 2016, attaching a sales contract for $2.1 million, all in apparent compliance with the ROFR. The offer set out specifically that it was presenting the contract on behalf of Diversified to comply with the ROFR.

It was at this point that Karbank claims it first became aware that Diversified had acquired the Property through a deed in lieu of foreclosure from REACH.

- *July 29, 2016: Lawsuit filed by Karbank.*

On July 29, 2016, Karbank filed suit against REACH for breach of contract, claiming it had a right to notice and an opportunity to buy the Property for the amount for which Diversified purchased the loan from Bank. In its petition, Karbank alleged three points in time when it believed REACH breached its contract. According to its petition, breaches occurred when:

1. Diversified purchased the note and mortgage from the Bank (which was in December 2015, filed with the Register of Deeds January 2016);
2. REACH first had notice that it was being asked by Diversified to provide a deed in lieu of foreclosure if it defaulted; and
3. the deed in lieu of foreclosure was accepted and filed.

- *March 2018: District court finds that there was a sale that triggered the ROFR and that the case could proceed to trial to determine damages*.

The district court decided, by way of summary judgment, that a sale occurred when REACH agreed to issue a deed in lieu of foreclosure to Diversified and did not notify Karbank. That would have been when the Loan Modification was signed in December 2015.

> "[T]he tipping point for the right of first refusal happened when REACH decided it would deed the fee estate to Diversified in lieu of foreclosure. The bell rang at

> that point in time. And REACH failed to notify Karbank of the opportunity to exercise its rights."

Although we are not bound by any findings by the district court, it found that for purposes of determining whether the Loan Modification was a sale,

- A deed in lieu of foreclosure is different from a foreclosure.
- The transfer of property for a price is a sale.
- The term price refers to money or any other consideration.
- Karbank did not need to show that REACH had a specific intent to sell to Diversified under the ROFR, only that it was willing to accept an offer from Diversified to purchase.
- Whether the deed in lieu transaction was voluntary is irrelevant.
- But the deed in lieu transaction here was voluntary because the mere presence of outside influence is not enough to make a potential sale involuntary. It is the level of outside influence that is important.
- It is not duress for one to threaten to take legal action as the law allows.
- The reasons REACH deeded the Property to Diversified was irrelevant.
- The fact that Karbank could not have matched the exact terms of Diversified's offer because it did not hold the mortgage was irrelevant.
- Karbank's allegations about the lack of good faith and fair dealing by REACH and Diversified were not considered in determining whether this was a sale.

V. THE SANCTITY AND PRIORITY OF A NOTE SECURED BY A MORTGAGE IS EXAMINED

The rationale for this dissent must begin with the basic, foundational rule that, in Kansas, a mortgage is a lien on real property executed to secure payment of a debt. All written instruments affecting an interest in real estate are subject to recording in the register of deeds office where the real estate is located. K.S.A. 58-2221; K.S.A. 58-2301.

The reasons for this are clear. Such a filing places all who have any dealings with the property on notice of its terms. Any agreements entered by third parties that are contrary to the terms of the recorded note and mortgage would be entered at the third party's own peril. See K.S.A. 58-2222 ("Every such instrument in writing, certified and recorded in the manner hereinbefore prescribed, shall, from the time of filing the same with the register of deeds for record, impart notice to all persons of the contents thereof; and all subsequent purchasers and mortgagees shall be deemed to purchase with notice.").

Generally, no liens supersede the priority of a lender's recorded lien in Kansas unless specifically authorized by statute. And purchase money mortgages that are recorded promptly have priority over most liens and claims attaching to the property through the mortgagor, including existing judgments. Wigner, Real Estate Finance*:* Kansas, Q&A (2023). Kansas caselaw has supported this superior priority position in varied situations for over a hundred years. See *Kuehn v. American Nat. Bank of Pryor, Okl*., 117 Kan. 717, 719-21, 232 P. 1060 (1925) (court found that where holder of a subsequent mortgage filed it first, it was still inferior to the purchase-money mortgage of which subsequent mortgage holder was well aware); *Pratt v. Topeka Bank*, 12 Kan. 570, 1874 WL 669 (1874) (first recorded case); *American General Financial Services, Inc. v. Carter*, 39 Kan. App. 2d 683, 689, 184 P.3d 273 (2008) (purchase money mortgage has priority over tax lien even though the obligation preexisted the mortgage).

VI. The Assignment of a Mortgage Does Not Impact Its Priority

The assignment of a mortgage does not impact its priority. See *Bank Western v. Henderson*, 255 Kan. 343, 348, 874 P.2d 632 (1994) ("There is nothing in the statutes or case law which indicates that an assignment of a mortgage or the failure to record that assignment somehow affects the priority of the mortgage.").

The parties do not dispute in their briefing, nor did they at oral argument, that when Diversified purchased the note and mortgage from Bank, it stepped into the shoes of Bank and had all the same rights and responsibilities Bank had. Its sole responsibility was its contract relationship with REACH. It was not a party to the contract between REACH and Karbank. Karbank does not allege Diversified had any independent legal duty to it.

VII. KARBANK ENTERED INTO THE ROFR SUBJECT TO THE NOTE AND MORTGAGE

A "'right of first refusal is known more technically as a preemptive option, as a right of preemption, or simply as a preemption'"; it is a right to buy before or ahead of others. *Tadros v. Middlebury Medical Center, Inc.*, 263 Conn. 235, 240, 820 A.2d 230 (2003). A right to first refusal agreement does not create a lien on the property—even when filed with the register of deeds. The filing of a right of first refusal simply gives notice to future purchasers that the holder has a contractual interest with the title holder that it could assert against any contract for sale the title holder enters with third-party purchasers. It is nothing more, nothing less. See *In re Fleishman,* 138 B.R. 641, 647 (Bankr. D. Mass. 1992) (right of first refusal is not an interest in property). Diversified refers throughout its appellate brief to the ROFR as a "Subordinate Option Contract" and I agree that is an apt description.

Because the Bank had first priority promissory note and mortgage on this Property, not only by the terms of said documents, but by the common understanding of the sanctity of said agreements as mentioned above, Karbank entered into any agreements with REACH that did not include Bank with full knowledge that the Bank had certain rights under the agreement and REACH was bound by the terms. It was not only on notice by the filing of the note and mortgage, but it admits that it understood its agreement was subordinate. And this is what makes this case different from any other case cited by the majority, the parties, or the district court. Karbank did not get Bank approval.

Once Karbank filed the agreement with the Register of Deeds, its terms only applied to subsequent third-party purchasers of the Property. Because the agreement did not exist until long after the first security interest in Bank was recorded, Bank had no obligation under the agreement. It was always free to do what it needed to do to protect its interest in the Property consistent with its agreement with REACH.

A lender with a superior, first-in-time recorded mortgage has no obligation to offer encumbered property to subordinate interest-holders before accepting that property in lieu of foreclosure. Rather, lenders are protected by Kansas' recording and priority statutes, and justified by acting consistently with their superior contract rights.

Karbank seems to agree with this, but basically asserts that Bank might not have had an obligation, but REACH had an obligation to Karbank that was subordinate to any of its responsibilities to the Bank or to any authority it had given the Bank. It puts no stock in the fact that Karbank was legally on notice of the heavy hand Bank could hold over REACH in the case of default. Karbank understood that REACH had conveyed all right, title, and interest in the Property to Bank. And it also recognized that under the mortgage that if REACH permitted the Property to be encumbered without the lender's permission, the lender could declare a breach and force foreclosure or any of its other stated remedies under the note and mortgage documents.

Accordingly, Karbank signed the ROFR knowing that Bank had superior rights to the Property. When Karbank did not obtain Bank's approval on the lease and the ROFR it inherently recognized that the ROFR could not place any encumbrance on the Property superior to or in conflict with the preexisting agreement between Bank and REACH.

That is the result the law in Kansas supports based on the facts here. The district court failed at the most fundamental level by seemingly ignoring the fact the Bank never signed or committed to the ROFR.

My analysis could end here. The ROFR did not bind REACH or Diversified as it related to anything involving negotiations about default on the superior promissory note and mortgage. Anything related to the first priority note and mortgage was necessarily outside the scope of the ROFR. It is irrelevant whether it met the definition of a "sale" or not. I withhold judgment as to whether the result may be different had the Bank signed off on the ROFR, but it did not. Without its signature REACH was not bound by the ROFR as it related to any negotiations about the note and mortgage.

But even if this were not dispositive, there are other reasons the Loan Modification Agreement that contained a contingency that a deed in lieu of foreclosure would issue upon default is not a sale that would trigger Karbank's rights if it had any.

VIII. A FORECLOSURE IS NOT A SALE

The parties do not dispute that had Bank or Diversified simply foreclosed on this mortgage it would not be a sale. In fact, in its first memorandum decision the district court lists no fewer than eight decisions that find that a foreclosure is not a sale. I won't list them all here. But suffice it to say, these cases seem to revolve around the finding that a foreclosure is not a voluntary transaction, thus it cannot be a sale. I have no reason to doubt this statement of law by the district court, and the parties do not dispute it. A foreclosure is not a sale. See Annot. 17 A.L.R.3d 962 (1968) ("Most of the few authorities considering the question take the view that a foreclosure or similar involuntary sale is not within the contemplation of a 'first refusal' option.").

IX. A DEED IN LIEU OF FORECLOSURE IS NOT A SALE

A. *Deeds in lieu of foreclosure are common and are preferred over foreclosure by sophisticated lenders and borrowers.*

A deed in lieu of foreclosure, also known simply as a deed in lieu, is "[a] deed by which a borrower conveys fee-simple title to a lender in satisfaction of a mortgage debt and as a substitute for foreclosure." Black's Law Dictionary 521 (11th ed. 2019). As here, these deeds extinguish the debt of the borrower. Deeds in lieu of foreclosure are not an unusual remedy sought by lenders and are often sought by defaulting churches. See Fielding, *Debt Among the Faithful: Churches, Lenders & Troubled Loans in Kansas*, 88 J.K.B.A. 34, 43 (June 2019) ("Whether in or out of bankruptcy the harsh reality is that some churches have incurred too much debt and do not have the wherewithal to repay it. Consequently, liquidation and dissolution are the only viable options. If the church pledged real property as collateral for a mortgage then the lender *will be entitled to* foreclose upon the property *or* enter into a deed-in-lieu of foreclosure." [Emphasis added.]). And some authors have suggested that in the unique case of church loans, leaders often believe that donors will come to their rescue, forestalling any action until it is too late to avoid legal remedies. There is a common fear that a foreclosure action will bring negative publicity to the church. 88 J.K.B.A. at 46. See Foohey, *When Churches Reorganize*, 88 Am. Bankr. L.J. 277, 293 (2014) ("[T]he primary goal of the vast majority of congregations studied was to save their building from foreclosure."). So they seek to avoid such a result. Here, it was believed a foreclosure by Bank would be humiliating for the church, damaging to the ministry, and devastating for the stakeholders—those who had loaned unsecured funds for the down payment and other expenses.

Even lenders hesitate to judicially foreclose on a church. In this case, personnel at Bank revealed that one of the reasons it was motivated to sell and assign the note and mortgage was because of the damage to the Bank's reputation that follows the foreclosure on a church.

And this is not limited to churches. Many legal authors have stated their preference for deeds in lieu when there are no junior lienholders. The holder of a loan and mortgage can foreclose on it when the borrower does not pay or otherwise fails to comply with the terms of the note and mortgage. Or it can extend the loan to allow the borrower more opportunities to pay. It can amend the terms of the loan in a virtually limitless number of ways by agreement of the parties. Freyermuth & Whitman, *Residential Mortgage Default and the Constraints of Junior Liens*, 57 U. Louisville L. Rev. 207, 207-08 (2019) ("When a residential mortgage borrower becomes delinquent in payments and is unable to cure the default, there are two general courses of action available to the loan's servicer. First, the servicer may agree with the borrower on a 'workout'—usually in the form of a modification of the loan to reduce the monthly payments, grant a moratorium on some payments, change the interest rate or maturity date, or otherwise make it easier for the borrower to cure the delinquency and return the loan to performing status. Second, the servicer may determine that a workout is not feasible, or that one has already been tried and failed. Now the servicer's objective is to foreclose the mortgage or otherwise arrange a transfer of title to the real estate to the holder of the loan, or to approve a 'short sale' that will liquidate the property and return to the holder an acceptable sum as a payment of the loan.").

Thus, among the limitless number of agreements lenders and borrowers can enter when borrowers are in default, one is a deed in lieu of foreclosure. Likewise, they can combine remedies. Here Diversified extended the loan, agreed to help REACH market the Property to other churches, and only if those failed would it accept the proffered deed in lieu of foreclosure. Such an approach serves to not only pass title of the property to the lender, but usually forgives any deficiency judgment that the lender may pursue against the debtor. It is worth more than the balance due on the loan. The balance due would rarely be the sole damages that would be sought in a foreclosure action. Costs of bringing the foreclosure, continuing to pay taxes and insurance on the property, accumulating interest, and property upkeep could be a part of the lender's damages—even if the property has some equity at the time of foreclosure.

There are also practical reasons that a lender may want to avoid a foreclosure action. First, they are costly. They require a judicial filing, attorneys, and notice. Judicial proceedings take time. As noted, interest continues to accrue on the loan, casualty insurance must be maintained, and taxes must be paid. A sale is delayed. As costs increase, equity is depleted. There may also be personal or corporate tax considerations in play for the borrower and the lender in deciding whether judicial or nonjudicial foreclosure would be best. The borrower is very likely judgment proof, with the property being the primary asset.

> "[I]f loss of the mortgaged property is inevitable for the defaulting borrower, there is little point in forcing the creditor to go through the cumbersome process of foreclosure. . . .
>
> "Thus, in a substantial proportion of cases, it makes sense for the borrower to offer to deed the property to the creditor voluntarily in lieu of going through the foreclosure process." 57 U. Louisville L. Rev. at 241.

And finally, Kansas courts "prefer that parties settle their disputes." *O'Neill v. Herrington*, 49 Kan. App. 2d 896, 903, 317 P.3d 139 (2014); see also *Bright v. LSI Corp.*, 254 Kan. 853, 858, 869 P.2d 686 (1994) (the law encourages settlement).

B. *Just like a judicial foreclosure action, a deed in lieu of foreclosure generally involves compulsion.*

The transfer of title to a property through a deed in lieu of foreclosure involves an element of compulsion similar to a foreclosure sale. A grantor in a deed in lieu of foreclosure is transferring its property expressly to forgo foreclosure action, which implies duress on the part of the grantor. Without evidence that the transfer of title to the subject property by deed in lieu of foreclosure was absent *any* element of compulsion on the part of the grantor, some courts refuse to consider them to be arm's-length transactions. *Hof Fin. I, LLC v. Marty Wynne Deschutes County Tax Collector*, No. TC-MD 110913C, 2012 WL 4458174, at *4 (Or. Tax 2012) (unpublished opinion).

Here Karbank has doggedly argued that Diversified's actions in seeking the deed in lieu of foreclosure was predatory and allowed it to keep REACH's equity with no contractual assurance that it would use the equity to pay off trusting parishioners. This seems to imply that REACH was under economic duress and Diversified fraudulently offered them a way out. A mere statement and perhaps even a belief that one is acting voluntarily, may not make it so when the bargaining power varies so greatly as it did here and as it does in any mortgage-mortgagee situation. And when fraudulent promises have been made to induce that "voluntary act" as Karbank argues, the question of whether the action was truly voluntary is placed in doubt. Kim, *Relative Consent and Contract Law*, 18 Nev. L.J. 165, 175 (2017) ("Under contract law, whether a party has 'freely' or 'validly' consented typically hinges upon whether the other party manipulated, exploited, or coerced the ostensibly consenting party. The concept of consent itself is vitiated by force or deception.").

Karbank does not get it both ways—it was voluntary so the "foreclosures are not sales" rule does not apply *and* it was an action fraudulently induced to tortiously interfere with Karbank's rights under the ROFR—which would suggest it was not really voluntary. "The distinction between voluntary settlements and negotiations under duress has long been a fruitful theme of discussion by the courts." *Centric Corp. v. Morrison-Knudsen Co.*, 731 P.2d 411, 419 (Okla. 1986).

Here the majority seems to use voluntary to mean that REACH could have acted in an alternative manner but chose not to. But it fails to consider what other pressures may have been facing REACH, even if those pressures may have been unique to its position as a church.

C. *Kansas statutes do not recognize a deed in lieu of foreclosure as an arm's-length and voluntary sale.*

This transaction was not considered a "sale" under the Kansas statutes. See K.S.A. 79-1486(a) ("'[s]ale' . . . shall include all transfers of real estate for which a real estate sales validation questionnaire is required"). At the top of the Special Warranty Deed in Lieu of Foreclosure conveying the Property to Diversified is the notation, "No real estate sales validation questionnaire is required because this deed falls within the exception set out in K.S.A. 79-1437(e)(2)." K.S.A. 79-1437e(a)(2) (real estate sales validation questionnaire does "not apply to transfers of title . . . made solely for the purpose of securing or releasing security for a debt or other obligation"). The questionnaires are completed to assist the county in property valuation. K.S.A. 79-1437c. Transactions that are generally not considered to be arm's-length transactions are not used in property valuations studies for obvious reasons; thus, like the deed in lieu of foreclosure, here, the sales questionnaires need not be completed. K.S.A. 79-1437e (other exclusions include divorce settlements, sheriff's deeds, quitclaim deeds to clear encumbrances, etc.).

X. REACH'S MERE ENTRY INTO THE LOAN MODIFICATION AGREEMENT WAS NOT A SALE UNDER THE PLAIN LANGUAGE OF THE ROFR

A. *A right of first refusal is a preemptive right.*

A right of first refusal agreement, also called a right of preemption, "does not give to the pre-emptioner the power to compel an unwilling owner to sell, but merely requires the owner, when and if he decides to sell, to offer the property first to the person entitled to the pre-emption at the stipulated price." *Anderson v. Armour & Co.*, 205 Kan. 801, Syl. ¶ 1, 473 P.2d 84 (1970). "The key to activation of a holder's right of first refusal is mutual willingness to enter into a sale at a specific price satisfactory to both the third party and the seller." *Waste Connections of Kansas, Inc. v. Ritchie Corp.*, 296 Kan. 943, 968, 298 P.3d 250 (2013); *Bergman v. Commerce Trust Co., N.A.*, 35 Kan. App. 2d 301, 308, 129 P.3d 624 (2006) (holding that a right of first refusal is activated upon a showing that the owner was "willing to sell the property" and had received "a bona fide written offer to purchase the property that [the owner] was willing to accept"). Kansas will only enforce a "right of first refusal" agreement if conditions exist that ripen the preemptive option to purchase into a present enforceable contract right. 35 Kan. App. 2d at 306 (citing *Anderson*, 205 Kan. at 805).

The trial court erred in finding that the Loan Modification Agreement constituted a sale with a willing seller that received a bona fide offer to purchase the Property.

B. *The ROFR here did not involve a third party.*

The key to activation of a holder's right of first refusal is mutual willingness to enter a sale at a specific price satisfactory to both *the third party* and the seller. *Waste Connections of Kansas, Inc.*, 296 Kan. at 968. The right of first refusal was not triggered here because there was no transfer of an interest in the property to a third person. See *Pellandini v. Valadao*, 113 Cal. App. 4th 1315, 1319, 7 Cal. Rptr. 3d 413 (2003).

This is no different than a transfer of property between coowners. The mortgagor and mortgagee both have ownership rights in the property. In fact, as part of the note and mortgage agreement, REACH "irrevocably and absolutely" sold, conveyed, transferred, assigned, mortgaged, and warranted all of the Property. And although this court held in *Rucker Properties, L.L.C. v. Friday*, 41 Kan. App. 2d 664, 669, 204 P.3d 671 (2009), that a transfer of property *without payment* between coowners does not trigger a right of first refusal, it does not exclude the same result when the parties are in the position of mortgagor-mortgagee. It focuses its decision on purchase by a third-party stranger, not the mere change of control over property by existing interest holders. There was no money exchanged between REACH and Diversified specifically related to the deed in lieu of foreclosure. There was a loan agreement that had a contingency upon default that would allow Diversified to file the deed in lieu of foreclosure. This has none of the hallmarks for a sale to a third person.

C. *The ROFR required evidence that REACH "elect[ed] to sell the [p]roperty," and the evidence did not support such a finding.*

REACH did not intend to sell the Property to Diversified when it entered the Loan Modification Agreement. As most borrowers faced with imminent foreclosure, REACH did not "elect to sell" or "desire[] to enter into a contract or any other understanding to sell" as contemplated by the ROFR. As with anyone facing default, REACH's intent in signing the Loan Modification Agreement was not to sell the Property, it was to obtain a loan with another six months to try to sell the Property to a third party and recoup its losses. Diversified stressed to REACH that it wanted to get the Property sold and then they could talk about paying off the note. REACH wanted to *avoid* the embarrassment of judicial foreclosure and make its parishioners whole.

And there was no evidence presented that the Loan Modification Agreement was a sham to circumvent Karbank's right of first refusal. REACH and Diversified presented offers to Karbank before and after the Loan Modification Agreement was entered reflecting their intent to comply with the ROFR. When granting summary judgment on the sale issue, the district court specifically declined to consider any bad faith or lack of fair dealing by Diversified and REACH. So that was not a factor in the court's summary judgment decision that the Loan Modification Agreement constituted a sale.

D. *Karbank's ROFR was subject to the first priority purchase money security interest.*

Karbank was a real estate development and brokerage firm. Steve Karbank, the principal owner was a sophisticated real estate developer. The loan and mortgage were on file to put all potential purchasers on notice. There was no need to even discuss it in its contract with REACH because it would be rare for a loan and mortgage not to contain such provisions. REACH was subject to the loan and mortgage foremost. Therefore, as already discussed in this dissent, its negotiation with its lender to satisfy the terms of a superior and preexisting contract of which Karbank was aware, are irrelevant to Karbank's ROFR in the case of a sale.

This was not a sale by REACH, it was a negotiated settlement under its preexisting contract with Bank and later Diversified as its assignee for a nonjudicial foreclosure—a common action in the industry and one which REACH and Karbank knew would be possible when they entered their ROFR.

E. *Holders of a right of first refusal are rarely able to match the lender's terms, and Karbank concedes it could not here.*

When a lender is exercising its contractual rights against a borrower, a third party would rarely, if ever, be able to match the terms of any condition precedent, like extending the length of the loan and waiving the deficiency. Both Karbank and the district court conceded as much. A third party does not carry the same toolbox as a lender.

Granted, there is support for the majority's conclusion that the mere fact that there could not be an exact match of terms is not dispositive if the court is able to fix a price for those terms. Slip op. at 35. But Karbank presented no evidence to the court that it could match the terms or that there was a money equivalent for the terms it could not match. It has always contended that it was entitled to purchase the Property for $909,000, giving no consideration for the extension of time on the loan or the efforts to sell to a church. The price Diversified paid to purchase the loan from Bank is the only figure the district court ever considered.

Such a disparity in the terms of any alleged "sale" support a finding that loan agreements are typically not sales, but instead negotiated settlements unencumbered by subordinate agreements.

Because there was no bona fide written offer, no third party, and no terms that could be matched, this was not a sale under the ROFR.

XI. The District Court and the Majority Took Several Wrong Turns

The majority holds, consistent with most cases that have reached this issue, that a deed in lieu of foreclosure with Bank is often not considered a voluntary sale, so it would not trigger the ROFR. Slip op. at 31. But the majority finds that the unique facts here warrant a finding that this transaction was a voluntary sale, requiring a different result for the Bank's assignee, Diversified. Here are the unique facts the majority relies on to conclude that this was a voluntary transaction and therefore REACH breached its contract with Karbank.

A. *REACH was not facing imminent foreclosure*.

The majority finds that this was a voluntary sale because the REACH was not facing imminent foreclosure. Slip op. at 30. In other words, it did not have the duress that a typical borrower would have.

First, this statement is not supported by the record. In fact, it even conflicts with other statements in the majority opinion. The majority notes, "The parties knew that REACH would be unable to pay the loan by the extended due date, given that the church was closed and not generating any income." Slip op. at 31. Given that the note and mortgage specifically allowed for foreclosure as an option upon default, and failure to make timely payments constituted default, REACH was facing imminent foreclosure.

Second, anytime a bank assigns a loan that is already in default, it would appear to everyone that there may be significant problems paying off the loan. It is irrelevant why REACH would have entered into the agreement when it could not comply. We can only speculate with regards to why a church would be hopeful of divine intervention to save the congregants. It entered the agreement, and it was in default facing all contractual consequences that could bring, including foreclosure—from Bank before December 2015 and from Diversified after December 2015.

B. *This was not an arm's-length transaction because of Christie's involvement.*

The majority contends that because Christie and REACH had a preexisting relationship, this was not an arm's-length transaction. It was an agreement between the church and its major benefactor; therefore, there was not the duress that would be typical of an arm's-length transaction—where the parties did not have a relationship. Thus, the majority contends it was a voluntary transaction and the general rule does not apply.

The majority bolsters this argument suggesting Christie turned what is normally not a sale into a sale because Diversified did not have to foreclose here. "Nothing prevented Diversified from again extending the term." Slip op. at 31. That is true, but irrelevant to the legal analysis. Whether voluntary or involuntary a lender is never confined to a particular remedy. Nothing prevented Karbank from purchasing the note directly from the Bank either, in fact Christie suggested as much. I am reminded of the saying, "Ay! If ifs and ands were pots and pans, there would be no work for tinkers' hands."

But, as discussed earlier, deeds in lieu of foreclosure are generally not considered arm's-length transactions. Diversified had the right under the contract to do what it did. Its benevolence in extending the inevitable until May to try to sell the Property to a church consistent with REACH's wishes, should not be penalized. It could extend, it could foreclose, it could negotiate a deed in lieu of foreclosure unencumbered by any subsequently entered agreements to which it was not a party. Karbank and the world were legally deemed to be on notice of this beginning in September 2012.

C. *The value of the Property exceeded REACH's debt.*

The majority reasons that if a foreclosure had taken place REACH would have been able to realize its equity. Slip op. at 30. In other words, it had nothing to fear from foreclosure, which points to the Loan Modification Agreement being a voluntary sale triggering the ROFR.

I located no cases that suggested that a sale was found to exist based on how much equity there was in the property. And valuation is often a very fluid concept. Johnson County appraised the Property in 2015 at $2.1 million, but by 2016 the value dropped by 13% to $1.8 million. In 2018, the district court deemed the Property value at $2 million. So the valuation was somewhat fluid. And expenses were mounting every day depleting that equity. Interest was accruing, taxes were going unpaid, insurance payments still had to be made. The deed in lieu of foreclosure stopped that bleeding quicker and more efficiently than a foreclosure would have.

Unlike an arm's-length transaction, the lender and the borrower here had a relationship that made REACH's decision to agree to a deed in lieu of foreclosure understandable. Diversified was controlled by Christie. Christie was a parishioner and benefactor of the church who had donated hundreds of thousands of dollars to REACH. Whether there was any legal basis or not, REACH believed that Christie would make sure that once Diversified sold the Property it would return the money to parishioners who had issued unsecured promissory notes for the down payment. This would make them whole without further depleting any equity in the Property that would naturally happen as the result of a foreclosure and it would save the church the embarrassment of a foreclosure. This does not evidence a desire to sell the Property to Diversified, in fact just the opposite. Rather than face a foreclosure in the fall of 2015, REACH's desire was to extend the loan and sell the Property itself (in a way that would require it to comply with the ROFR). It agreed to the contingency of a deed in lieu of foreclosure only as a last resort lacking other options. This does not lend itself to the finding of a voluntary transaction.

D. *Christie knew of the existence of the ROFR*.

Of course, he did. Even if he had claimed he were not aware, the world was placed on notice of the ROFR when Karbank filed it with the Register of Deeds in November 2015. And Christie not only knew about it, but he tried several times, both as the broker and later as Diversified to offer the Property to Karbank—which rejected each attempt. So the singling out of Christie's knowledge and not anyone else to justify a finding that the transfer of a deed in lieu was voluntary, is unfounded.

In sum, I fail to see how any of the factors listed by the majority are unique enough to depart from what it concedes is the general rule—deeds in lieu of foreclosure are not sales and are generally not considered voluntary. Whether Christie knew about the ROFR, is irrelevant to whether the deed in lieu of foreclosure was a sale triggering it. Whether there was equity in the Property is irrelevant. REACH was facing imminent foreclosure and its agreement to give Diversified a deed in lieu of foreclosure did not reflect a voluntary sale. This was simply a negotiated way out for REACH to stop the bleeding. The ROFR was entered into after the first purchase mortgage security interest and was entered subject to its terms. Any negotiation that took place between the Bank, its successor Diversified, and REACH related to the loan and mortgage, and REACH's default was outside the scope of the ROFR and not tethered to it.

XII. THE EFFECT OF THE MAJORITY'S DECISION WILL BE SEISMIC

According to testimony here, appraisers and financial institutions in Kansas do not recognize deeds in lieu of foreclosure as a sale. This aligns with K.S.A. 79-1486(a). If the majority holding is allowed to stand, several things will happen that seem to depart from current real estate practice and policy in Kansas.

1. First-in-time priority mortgage holders will be subject to the terms of later contracts entered into by their borrowers, even though they were not signatories to those contracts and even though the mere entry into the contract violated the borrower's contract with the lender. This adds a risk to lenders that they do not face today.

2. Accordingly, it discourages Lenders from obtaining deeds in lieu of foreclosure, the process widely believed to be the more efficient way for all parties to address a default. Lenders will be forced (based on agreements that may exist that they were not privy to when entered) to file foreclosure actions, clearly a more timely, costly, and perhaps more detrimental result for borrowers rather than risk having to relinquish any claim to amounts owing outside the balance remaining on the note. This action by lenders in turn forces borrowers to endure a foreclosure action that is more costly, provides them no protection against a deficiency judgment, continues to deplete any equity that may be in the property, and reflects poorly upon any institution that wants to maintain its goodwill and reputation in the community.

Here the majority finds that this was a sale and Karbank had a right to buy the Property for the amount remaining due on the note, even though that was half the market value of the Property, and it was not truly representative of amounts owing. The lender had significant skin the game here. Every day that went by resulted in equity being depleted. And no one disputes the district court's finding that the Property was worth $2 million.

Although the above parade of horribles may be mere speculation, the result of the district court's finding should send chills down the spine of every real estate developer. The result here—which started with the erroneous finding that the Loan Modification Agreement constituted a sale—was a judgment against Diversified for roughly $1.1 million for tortious interference, and a separate judgment against REACH for the same amount for breach of contract. The district court also ordered that Diversified and REACH reimburse Karbank for all taxes due on the Property during their ownership and assessed hundreds of thousands of dollars in attorney fees against both REACH and Diversified. If that were not enough, in a cu de gras, the district court granted Karbank's judgment lien priority over Diversified's note—which meant Diversified was not even able to recover the cost of purchasing the note from Bank. Thus, when Karbank executed on both judgments, it obtained the Property, which the district court valued at $2 million for free. REACH lost all of its $1 million dollar equity in the Property and Diversified will be paid nothing for its $909,000 note. I fail to see how that could ever be a fair, equitable, and legally supportable result. The majority has corrected some of those inequities here, but by the time this case reaches its conclusion the amount spent in litigating an issue which one would have expected savvy real estate developers to have resolved long ago to their mutual benefit instead of their mutual destruction, is nothing less than frightening.

For these reasons, I depart from my learned colleagues.