IN THE

Supreme Court of Virginia

RECORD NO. 091244

AME FINANCIAL CORPORATION,

v.

PAUL G. KIRITSIS, EMILIE A. KIRITSIS,
and
GREENPOINT MORTGAGE FUNDING, INC.,

BRIEF OF APPELLEE GREENPOINT MORTGAGE FUNDING, INC.

From the Circuit Court
for the County of Chesterfield

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INTRODUCTION

The fundamental question in any appeal is whether the parties have had a fair trial on the merits and substantial justice has been reached. Appellant AME Financial Corporation ("AME") challenges the default found by the trial court in the case brought by the Kiritsises against AME, and implies that AME suffered a resultant lack of opportunity to litigate the merits of its case in the cross-claim against it by GreenPoint Mortgage Funding, Inc. ("GreenPoint"). It did not. The trial court gave AME a full and fair opportunity to litigate its case against GreenPoint before finding in favor of GreenPoint on all counts.

AME did not default in the GreenPoint cross-claim. The cross-claim was adjudicated in two days of trial and generated a six-page letter opinion from the trial court detailing its findings. The trial resulted in judgment against AME.

AME is attempting to entangle the cross-claim judgment in its challenge to the default found in the case against AME brought by the Kiritsises, which was adjudicated separately. AME must entangle GreenPoint's judgment with the Kiritsis default because AME has no appealable issue against GreenPoint. AME makes only a single conclusory assignment of error as to the cross-claim judgment, alleging

that the trial court based the judgment "in part" on the default. (AME Brief, at 2). There is no question presented for this assignment. (*Id*., at 3). There is one paragraph of argument in support of it, asserting that the default was the "foundation" for the judgment in favor of GreenPoint. (*Id*., at 9-10). There is one page in the AME's Statement of Facts relating to GreenPoint. (*See id*., at 8). Finally, AME asserts: "The basis for any duty of AME to repurchase the note from GreenPoint was the default-based finding." (AME Brief, at 15).

As GreenPoint will show, none of these points is meritorious. GreenPoint's claims against AME were fully and fairly litigated below and resolved against AME. AME never objected to trial court's alleged use of the default as a "foundation" in the GreenPoint case, principally because the trial court never did so. The single reference to the default in the trial court's letter opinion, in connection with one of the three counts, refers to an issue interjected by AME.

Given full opportunity to present its case, AME did not even contest the other two counts. Any one of the three counts entitled GreenPoint to the relief that the trial court granted.

AME's appeal is also procedurally defective as to GreenPoint because its assignment of error is legally insufficient and attempts to raise

an issue never raised or preserved in the court below. The judgment of the trial court is due to be affirmed as to GreenPoint.

COUNTERSTATEMENT OF THE CASE

The only mention of GreenPoint in AME's Statement of the Case is the following: "In later proceedings, the trial court entered judgment in favor of the co-defendant, GreenPoint Mortgage Funding, Inc., on its cross-claim against AME Financial. That ruling was based on the original default ruling." (AME Brief, at 1-2). Assignment of Error No. 2 states only: "The trial court erroneously granted judgment against AME Financial on GreenPoint's cross-claim, based in part on its finding of default." (*Id*., at 2). In its Statement of Facts, AME states that GreenPoint's claim "fully depended upon the resolution of the homeowner's original claim …" (*Id*., at 8). Whether the cross-claim judgment "fully depended," was "based on," or possibly only "based in part on" the trial court's decision on the Kiritsises' suit against AME, AME never identifies any specific legal error by the trial court.

In fact, none of AME's assertions are correct. GreenPoint's claim against AME did not depend on the suit against AME by the Kiritsises, except as to AME's breach of its duty to defend Greenpoint. GreenPoint

made demand on AME to repurchase the loan, which was the principal relief granted below, in October, 2005 (*see* A. 1411), long before suit was ever filed.

GreenPoint was a wholesale home mortgage lender. AME was a correspondent retail lender. AME made loans to borrowers such as the Kiritsises, and then sold those closed loans to GreenPoint. (*See* A. 965-69). As a correspondent lender, AME signed a "Seller Contract" with GreenPoint. (*See* A. 961-65). The Seller Contract incorporated an extensive Seller Guide. (A. 961, 963). The Seller Guide included warranties by AME and remedies in favor of GreenPoint. (A. 970-81).

As material here, the trial court found that the contract between GreenPoint and AME stated that if there were deficiencies in the note sold by AME to GreenPoint, AME would either repurchase the note or indemnify GreenPoint, at GreenPoint's discretion. (A. 1410). The trial court found that under the Seller Agreement, AME had also undertaken to indemnify, hold harmless and defend GreenPoint as a result of any deficiencies in documents transferred to GreenPoint. (A. 1413).

Prior to closing, AME committed to deliver the Kiritsis loan to GreenPoint on specified terms. This was known as a lock. (*See* A. 1006). The problem arose when the documents prepared for the closing contained

different terms. This occurred because an AME employee entered incorrect parameters into the computer program that generated the loan documents. (*See* A. 342-43).

The Kiritsises were unaware that AME had committed to GreenPoint to deliver the loan on terms different from those in the documents presented to them at closing. (*See* A. 343-44). The mistake was discovered by GreenPoint when the Kiritsis loan documents were sent to GreenPoint and failed to match the "lock."

GreenPoint returned the documents to AME for correction. The trial court found that AME contacted the Kiritsises and asked them to execute new loan documents, and the Kiritisises refused. (A. 1409).

An AME employee, Rob Duer, executed new conforming loan documents under the alleged authority of the limited power of attorney and Document Correction Agreement signed by the Kiritsises at closing. (A. 1409).

The Kiritsises were unaware that Duer had done this. Duer also did not tell GreenPoint that the Kiritsises had refused to execute new loan documents. The Kiritsises did not find out what Duer had done until a dispute arose about resetting rates under the adjustable rate mortgage. That led to their discovery that the loan documents that GreenPoint had

purchased from AME were not the same as those that they signed at closing. (*See* A. 1409-10).

The trial court found that, on or about October 3, 2005, GreenPoint gave notice to AME to cure the breach within 30 days or repurchase the note. (A. 1410-11). The trial court found that AME did not dispute the deficiencies in the note. (A. 1410). The trial court found that AME did not cure the deficiencies in the note, nor did it repurchase the note. (A. 1412).

AME's Statement of the Case notes that the Kiritsises sued four defendants including AME. AME defaulted as to the claim against it by the Kiritsises. GreenPoint did not. GreenPoint answered the Kiritsis claim and cross-claimed against AME, seeking specific performance of the repurchase obligation and indemnity and defense under the Seller Contract. (*See* A. 34-36). AME refused.

Consequently, GreenPoint was required to put on AME's defense of the enforceability of the note sold to GreenPoint, which it did in the trial conducted on November 15, 2007. The trial court held that the power of attorney and Document Correction Agreement on which AME relied in executing the replacement loan documents did not authorize AME to take that action. (A. 422). The trial court held that GreenPoint was on notice, as a result of the form of the documents, that execution of the note was

unauthorized. (*Id*.) Therefore, GreenPoint was not a holder in due course and was subject to the same defense of unauthorized execution that the Kiritsises could raise against AME. (A. 424-25).

GreenPoint's cross-claim against AME was tried on February 4 and 8, 2008. (A. 1415). The trial court found that the note that AME had sold to GreenPoint was improperly executed. (A. 1410). Therefore, the trial court found, AME breached its contract with GreenPoint and caused GreenPoint damages. (*Id*.).

The trial court also found that Section 11-3.06 of Representations, Warranties and Indemnities portion of the Seller Agreement between GreenPoint and AME required that loan documents be true, complete and accurate and have been completely and properly executed. (A. 1412). The trial court found that Section also provided that AME warranted that there has been no fraud, misrepresentation or omission or inaccurate information. (*Id*.). At this point in its analysis, the trial court said:

> The Court has already held that Rob Duer improperly executed the note and that AME's conduct was fraudulent. GreenPoint argues that the Court's prior findings establish the breach in this case.
>
> AME signed contract asserting that it properly executed the note with the Kiritsises and that there was no fraud on the part of AME or its agents during the transaction. The Court has already ruled that Rob Duer improperly executed the note and that AME's conduct was fraudulent.

> There is no reason for GreenPoint to try that part of the case again. AME failed to live up to its warranty. The note was improperly executed and AME committed fraud during the transaction. GreenPoint has offered sufficient proof of a breach of warranty.

(A. 1412). This was the only instance in which it could be plausibly alleged that the trial court's judgment was "based in part on its finding of default." (*See* AME Brief, at 2). But the first ruling referenced – that Rob Duer improperly executed the note – refers to the trial court's ruling immediately preceding, and conceded by AME, that the note was improperly executed by Duer. (*See* A. 1410).[1] It did not refer to AME's default as against the Kiritsises in the principal case.

The reference to the holding that AME's conduct was fraudulent does refer to the default, because the only fraud in the case was established in that context. But the reference was immaterial. GreenPoint did not sue AME for fraud. (See A. 34-35). In fact, in the only reference to fraud at the trial, counsel for AME had interjected the issue of "joint wrongdoers" (*see* A. 1222), and counsel for GreenPoint specifically disclaimed any intention to allege fraud (or any other tort) by AME. (*See* A. 1230-32). Counsel for AME then brought up fraud again (A. 1240), but conceded that GreenPoint

[1] The trial court had also held as a matter of law in the Nov. 15, 2007 trial that the power of attorney and Document Correction Agreement did not authorize Duer's action. (*See* A. 420-25).

was not making any claim of fraud against AME. (*Id*.). At the time, the trial court observed: "And so why is it relevant if there's no claim of fraud?" (A. 1240-41). Any fraud was only relevant because "fraud" was one of the matters that breached the warranty at issue in the case. (*See* A. 1412). But GreenPoint proved that Duer improperly executed the replacement loan documents. (A. 1409, 1410).[2]

"Fraud" and "fraudulent," in the context used by the trial court in its letter opinion, merely represented cumulative evidence of breach of the contractual warranty against fraud, misrepresentation or omission or inaccurate information. The "fraud" was the same breach proven by GreenPoint as a matter of evidence. (*See* A. 1412). Hence the trial court held that while the prior rulings were sufficient, GreenPoint had established the breach of warranty by presentation of evidence. (*Id*.).

This oblique reference to the default was immaterial. The trial court did not hold that AME was precluded in any way by the prior proceedings. It did not exclude any evidence offered by AME. It did not limit AME's introduction of evidence. Thus, the trial court found three breaches of the agreement, in only one of which was any possible reference made to the

[2] The trial court found that GreenPoint put on sufficient evidence of the improper execution (*see* A. 1412), but also found that AME did not contest the deficiencies in the note sold by AME to GreenPoint. (A. 1410, 1412).

default. Even in that instance, the trial court found that GreenPoint offered sufficient evidence to prove a breach of warranty. (A. 1412).

Next, the trial court found that the Seller Agreement required AME to indemnify, hold harmless and defend GreenPoint. (A. 1413). The trial court found that AME "provided no counter-argument on this issue," and concluded that AME did not hold GreenPoint harmless or defend it, and failed to indemnify it as required by the contract. (*Id*.).

On the basis of these findings, the trial court entered a decree of specific performance requiring AME to repurchase the loan according the terms of the contract between AME and GreenPoint. (A. 1415-18).

In subsequent proceedings, the trial court held that GreenPoint was entitled to recover its fees and costs, and, after an evidentiary hearing, awarded GreenPoint $186,362.17. (A. 1528-30). No error is assigned to any aspect of this later ruling.

At no time did counsel for AME assert that it was error for the trial court to rely on the default. No objection appears in the order entered on the trial court's letter opinion on the cross-claim (A. 1417), in AME's motion for reconsideration (R. I:1468), in the extensive list of additional objections filed by AME (A. 1517-23), nor in the objections to the final order. (A. 1530). In fact, the only reference in the record to AME's inability to present

a defense (*see* AME Brief, at 9-10) refers specifically to a defense to plaintiffs' claims, not to GreenPoint's. (*See* A. 1522).

COUNTERSTATEMENT OF QUESTION PRESENTED[3]

Where the trial court conducted a two-day trial on the merits, where AME's default was noted only in argument, and the trial court after review of the transcript documented its findings in a six-page letter opinion that obliquely mentioned AME's default in connection with only one of three independent breaches of the contract, while concluding that appellee put on sufficient evidence to prove the breach irrespective of the default, does appellant's conclusory assertion that "That ruling was based in part on the original default ruling," establish that appellant did not have a fair trial on the merits and substantial justice was not reached?

COUNTERSTATEMENT OF FACTS

The relevant facts as found by the trial court are set forth in GreenPoint's Counterstatement of the Case.

[3] AME's petition does not have a Question Presented that relates to Assignment of Error No. 2. The Questions Presented lists the questions on which the appellant intends to submit argument. Va.Sup.Ct.R. 5:17(c).

ARGUMENT

I. AME's Conclusory Assignment of Error is Insufficient and Asserts an Argument Not Raised or Preserved in the Trial Court.

It has always been considered insufficient to assert in conclusory fashion that the judgment of the trial court was erroneous, but this is in effect what AME has done in this case. The Rule requires that the assignment of error list the specific error in the rulings below on which the petitioner intends to rely. Va.Sup.Ct.R. 5:17(c); *see also Crone v. Richmond Newspapers, Inc.*, 238 Va. 248, 256, 384 S.E.2d 77, 81 (1989) (general statement that trial court erred insufficient to preserve specific issues on appeal). As to any alleged error other than granting judgment "based in part on its finding of default," AME's assignment of error is insufficient under Rule 5:17(c). *See Conyers v. Martial Arts World of Richmond, Inc.*, 273 Va. 96, 104 n.4, 639 S.E.2d 174, 177 n.4 (2007).

But basing judgment "in part" on the default is not per se contrary to law. This appeal illustrates the reason behind the Court's rule requiring that assignments of error be specific. Even after AME's opening brief on the merits, it is still not apparent what error, if any, that AME asserts the trial court committed in the GreenPoint-AME cross-claim trial.

AME never even cites to the trial court's letter opinion setting forth its reasoning and analysis of the evidence. Doing so would require AME to concede that while the trial court may have referred to the sufficiency of the default to establish a breach of warranty, it ultimately concluded that GreenPoint put on sufficient evidence to prove the breach, which AME conceded anyway. (*See* A. 1412). The unchallenged findings of the trial court are the law of the case on appeal. *Richmond, F.and P. R. Co. v. Sutton Co., Inc.*, 218 Va. 636, 636 n.1, 238 S.E.2d 826, 827 n.1 (1977).

AME also violated Va.Sup.Ct.R. 5:25. AME did not preserve any objection to the trial court relying on the default is support of its judgment for GreenPoint. The argument was not made at trial, in objections to the order granting specific performance, or afterward.

II. The Factual Predicate of AME's Argument Is Wrong Because the Trial Court Did Not Rely, Even in Part, on AME's Default in Ruling for GreenPoint.

The trial court set out its reasons for ruling against AME in detail. In fact, even to make such an assertion that the trial court's decision was "based in part" on the default requires inferences to be drawn in favor of AME from the language used by the trial court. As the prevailing party below, however, GreenPoint is entitled to have all inferences in support of

the judgment drawn in its favor. *Hudson v. Pillow*, 261 Va. 296, 299, 541 S.E.2d 556, 558 (2001).

The trial court mentioned two instances of proof of breach of warranty – Duer's unauthorized execution and "fraud." (*See* A. 1412). But factually, those two only refer to one incident – Duer's unauthorized execution of the replacement loan documents. The fact that Duer executed the replacement loan documents was undisputed. In fact, the trial court found that AME did not dispute that the replacement documents were defective. (A. 1410). In the November 15 trial between the Kiritsises and GreenPoint, the trial court had held as a matter of law, that Duer was not authorized to execute the replacement note. (A. 422). In the trial between GreenPoint and AME, the trial court, presented with the same evidence, merely adhered to that ruling, which, in any event, went unchallenged by AME.

The trial court could have held that the breach was established by the law of the case, *see, e.g., Walt Robbins, Inc. v. Damon Corp.*, 232 Va. 43, 49, 348 S.E.2d 223, 227-28 (1986); however, it did not. The trial court could have held that AME was collaterally estopped by the November 15 ruling because it was in privity with GreenPoint. *See, e.g., Bates v. Devers*, 214 Va. 667, 671, 202 S.E.2d 917, 921 (1974). It did not. It relied on the evidence heard at trial. It recited the evidence on which it relied in its letter

opinion.

AME does not cite the trial court's letter opinion. Instead, it cites only two parts of the record to imply that the trial court's judgment in favor of GreenPoint was related to AME's default. First, AME cites GreenPoint's cross-claim at ¶¶ 62, 66 (AME Brief, at 8 n.3 (citing A. 34)); however, ¶ 62 is merely a general statement that GreenPoint was entitled to indemnity. Paragraph 66 is a claim on AME's endorser's warranty on the note. GreenPoint went to trial only on claims of breach of contract, and breach of the contractual warranty and indemnity. (*See* A. 1410).

The second point cited by AME also does not support its contention that the default somehow was the basis for the trial court's ruling in favor of GreenPoint. AME cites to the February 8, 2008 trial transcript. (*See* AME Brief, at 8 n.3 (citing A. 1226, 1232, 1240-41)). AME's parenthetical characterizes these references as "AME's default was binding on GreenPoint, leading to GreenPoint's claim." But the trial court never held that AME's default was binding on GreenPoint. And GreenPoint's claim against AME arose before the default.

In any event, AME's first citation is to argument by counsel for GreenPoint in opposition to AME's motion to strike at the close of the plaintiff's evidence. (A. 1226). Counsel merely asserted that there was

sufficient proof of breach where the trial court had already found as to both parties that the note was defective. The third citation[4] refers to argument by AME's counsel that "the underlying accusation in all of this … is that AME somehow committed fraud and that they, in turn, committed fraud against GreenPoint." (A. 1240). But counsel for AME acknowledged that there was no claim of fraud against AME by GreenPoint. (*Id*.) What the trial court said, far from relying on the fraud established by the default, was: "And so why is it relevant if there's no claim of fraud?" (A. 1240-41).

Contrary to the tenor of the assignment of error, AME's counsel argued at trial that GreenPoint could not rely on the default as law of the case to establish a breach on the part of AME because that finding did not occur in proceedings between GreenPoint and AME. (A. 1235-38). AME's argument appears to have been some claim of lack of mutuality of estoppel. (*Id*.). The argument was not meritorious because, as to the validity of the loan documents, AME and GreenPoint were in privity. *See Nero v. Ferris*, 222 Va. 807, 813, 284 S.E.2d 828, 831-32 (1981). AME prepared the documents, had them executed, and negotiated the note to GreenPoint. Nevertheless, the trial court did not rely on the default, or any sort of preclusion, to find against AME. (*See* A. 1409-14).

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[4] GreenPoint cannot see any reference to the default at A. 1232.

Moreover, AME never asserted that the court should not consider prior proceedings. In fact, AME argued the opposite. Counsel for AME argued that the prior proceedings required the trial court to rule against GreenPoint based on collateral estoppel from the Nov. 15 trial. (*See* A. 1220-21, 1236). Far from asserting that reliance on the findings in other parts of the case would be error, AME in fact argued at trial that the trial court's prior ruling in the case between the Kiritsises and GreenPoint required the court to rule for AME. Any objection to the trial court's reliance in its prior rulings was clearly waived by AME's affirmatively seeking to use the trial court's prior rulings against GreenPoint. *See Garlock Sealing Technologies, LLC v. Little*, 270 Va. 381, 388, 620 S.E.2d 773, 777 (2005).

III. AME's Legal Predicate Is Flawed Because Even If the Trial Court Had Relied in Part on AME's Default in Ruling for GreenPoint, This Would Not Require Reversal.

The legal flaw in AME's argument is that, even if the default were considered by the trial court, that fact would not mandate reversal and a new trial. AME assumes, without citing a shred of authority, that if the default figured in any way in the judgment in favor of GreenPoint, and the default were to be overturned, then the judgment in favor of GreenPoint must be overturned as well.

This is not the law. As noted, AME advances no authority, and indeed no argument for the proposition that oblique mention of the default wipes away the weight of the evidence at trial and the doctrine of harmless error. There is no authority that provides that a mere discretionary act of the trial court such as the default against AME, even if found an abuse of discretion, nullifies, as a matter of law, a judgment after a full trial on the merits on different issues against a different party. In fact, as noted above, the trial court could have lawfully held that AME was precluded by the prior proceedings, even those against GreenPoint only, where AME and GreenPoint were in privity as to the enforceability of the note. Instead, the trial court permitted AME to put on its case. In doing so, AME elected not to contest the deficiencies in the note. (*See* A. 1410).

Consequently, AME can hardly be heard to assert, at least as to GreenPoint, that it was somehow precluded from putting on a meritorious defense. (*See* AME Brief, at 10). Given full rein to put on its defenses, AME did not even contest the essential facts of the case. It did not dispute the deficiencies in the note. (A. 1410, 1412). It offered not counter-argument on its breach of the obligation to indemnify, hold harmless and defend. (A. 1413). Instead, AME quibbled over the sufficiency of proof of the terms of the contract with GreenPoint, and technical issues over the

form of GreenPoint's cure notice. (*See* A. 1410-12). No error is assigned to the trial court's rulings on these matters.

AME's assertion (AME Brief, at 15) that the basis for any duty to repurchase the note arose from the default-based finding is preposterous. The trial court found that GreenPoint made demand on AME to cure the deficiencies in the note by letter of October 3, 2005. (A. 1411, citing Ex. 9 (A. 1028-31). The trial court found that the letter required AME to cure, or to repurchase the loan by November 4, 2005. (*Id*.). This was before suit was ever filed. The trial court found that the Vice President of AME testified to receiving the letter in early October. (*Id*.). AME's repurchase obligation arose under specific provisions of the Seller Guide. The trial court found that when AME failed to cure, it was obligated to repurchase, and when it failed to repurchase by November 4, 2005, it breached the contract. (A. 1412). Thus, the duty to repurchase had nothing to do with the default. GreenPoint's claim matured months before the lawsuit.

The general principle is that the judgment cannot be reversed for any defect, imperfection, or omission in the record or for any error committed at trial when it plainly appears from the records and the evidence at trial that the parties have had a fair trial on the merits and substantial justice has been reached. *See* Va. Code § 8.01-678.

Here, the trial court found that GreenPoint proved three separate breaches of the Seller Agreement. On the first, the trial court found that AME did not dispute the deficiencies in the note. (A. 1410). On the second, the trial court found that GreenPoint did not need to prove over again facts already proved in the case, but in fact did put on sufficient evidence to establish the breach of warranty. (A. 1412). On the third breach, the trial court found that AME did not even join issue with GreenPoint. (A. 1413).

The three breaches asserted by GreenPoint were three rights of action arising from a single cause of action. *See Roller v. Basic Const. Co.*, 238 Va. 321, 327, 384 S.E.2d 323, 326 (1989). AME breached the contract when it sent the defective note to GreenPoint, again when it failed to repurchase the note when demand was made, and a third time when it refused to hold harmless and defend GreenPoint when the litigation arose. All of these events occurred, and GreenPoint's rights accrued, before there was any default by AME.

GreenPoint's remedies, the scope of which AME also did not contest, were the same under any one of the breaches. GreenPoint was entitled to be put in as good as position as it would have been had the contract been performed. *See, e.g., Nichols Const. Corp. v. Virginia Machine Tool Co.*,

LLC, 276 Va. 81, 89, 661 S.E.2d 467, 471 (2008). Any one of these was sufficient to sustain the judgment. *See Boone v. Arthur C. Weaver Co.*, 235 Va. 157, 161, 365 S.E.2d 764, 766 (1988).

AME never even attempts to show that the alleged error deprived it of a fair trial and substantial justice. The trial court did not preclude AME from putting on any type of evidence against GreenPoint as a result of the default. It did not hold that the default was preclusive. Instead, it heard the evidence and found that GreenPoint proved three material breaches of the contract. No error is assigned to those findings. AME did not even contest two of the breaches. These unchallenged findings are sufficient to sustain the judgment even if the trial court were to have committed clear error on a third. But it did not. GreenPoint also proved the breach of warranty by evidence.[5]

The further the Court delves into the facts of this case, however, the more obvious it will be that justice was served. The Court can affirm the court below if the record shows, as this record clearly shows, that GreenPoint proved the elements of its case – the existence of the contract, its breach, and damages. The record shows that GreenPoint proved those elements with evidence independent of the fact of AME's default.

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[5] AME's concession on the deficiencies in the note (*see* A. 1410, 1412) was sufficient to prove the breach of warranty as well.

In view of the trial court's findings and AME's concessions, there is no respectable argument that substantial justice has not prevailed. If there were error, it was plainly harmless.

IV. Any Effect of the Default Was Tantamount to Invited Error Because AME Could Have Purged Its Default, and Chose Not To Do So.

What is more probative of the lack of any prejudice to AME is the fact that AME had the opportunity effectively to cure its default by repurchasing the note. AME not only had a practical opportunity to do this, but a legal obligation to do it. AME could have stepped into the shoes of GreenPoint and litigated all of the issues that it now claims it was precluded from presenting.[6] Indeed, as the trial court found in an unchallenged finding, AME had a contractual obligation to repurchase the note. GreenPoint sent its cure letter in October, 2005. Suit was filed in May, 2006. Judgment was not rendered against GreenPoint on the Kiritsises' claim until December, 2007. (A. 679-82).

It is elementary that the Court will not rescue a party from the effects of its own tactical decisions in the case below. *See McLean v. Com.*, 30 Va.App. 322, 331, 516 S.E.2d 717, 720 (1999). AME chose not to perform its contract with GreenPoint and now it seeks from this Court relief that it

[6] This is doubly true where AME also filed another suit against the Kiritsises in federal court while this suit was pending. (*See* Record I: 0932 ff.).

could have, in effect, given itself. AME should hardly be heard to complain that it was prevented from putting on a meritorious defense to the Kiritsises' claims when the decision not to avail itself of the opportunity to do so was entirely its own, as matter of trial tactics.

CONCLUSION

AME has failed to show that there is any error in the judgment below as regards GreenPoint. Also, AME has not asked for any relief against GreenPoint. It is a matter of record that GreenPoint's judgment for a specific performance of the repurchase obligation did not rely on the ruling of default. It is a simple point of fact that AME could have relieved itself of the default at any time by repurchasing the loan, which was its contractual obligation. Therefore, there is no error in the decision below and the ruling of the trial court is due to be affirmed as to GreenPoint.

Respectfully Submitted,

GREENPOINT MORTGAGE FUNDING, INC.

By Counsel:

s/ Robert L. Hodges

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CERTIFICATE

Pursuant to Rule 5:26(d) of the Supreme Court of Virginia, I hereby certify that on this 4th day of January, 2010, fifteen copies of this brief have been filed by hand delivery in the Office of the Clerk of this Court, that three copies each have been mailed to the following counsel on or before this date, and an electronic copy filed with the Clerk contemporaneous with the filing of the brief.

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