WELLS FARGO FINANCIAL LOUISIANA, INC.	*	**NO. 2017-CA-0413**
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VERSUS		**COURT OF APPEAL**
	*	
BETTY MONTGOMERY GALLOWAY, VALERIE SENNETTE GALLOWAY AND GREGORY LOUIS GALLOWAY	*	**FOURTH CIRCUIT**
		STATE OF LOUISIANA

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APPEAL FROM
CIVIL DISTRICT COURT, ORLEANS PARISH
NO. 2016-03487, DIVISION "I-14"
Honorable Piper D. Griffin, Judge
* * * * * *

Judge Rosemary Ledet
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(Court composed of Judge Daniel L. Dysart, Judge Rosemary Ledet, Judge Regina Bartholomew Woods)

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APPEAL CONVERTED TO WRIT; WRIT GRANTED; JUDGMENT REVERSED AND REMANDED WITH INSTRUCTIONS; MOTION TO REMAND DENIED

NOVEMER 15, 2017

This is a suit on a promissory note and mortgage. From the trial court's judgment granting, in part, the peremptory exception of prescription filed by the defendants, Betty Galloway and her two children (Valerie Sennette Galloway and Gregory Louis Galloway) (collectively the "Galloways"), the Galloways appeal. For the reasons that follow, we convert the appeal to an application for supervisory writ, grant the writ, reverse the trial court's judgment, and remand with instructions.

FACTUAL AND PROCEDURAL BACKGROUND

On April 7, 2016, Wells Fargo Financial Louisiana ("Wells Fargo"), as successor to Norwest Financial America, Inc., commenced this suit, entitled "Petition to Enforce Security Interest by Ordinary Process," against the Galloways. The basis for the suit was two-fold. First, December 1, 1999, the Galloways, as co-owners of a certain immovable property in New Orleans, Louisiana, executed a multiple indebtedness mortgage (the "Mortgage"). Second, on August 14, 2002,

Betty Galloway executed a note in the original principal amount of $58,652.28 (the "Note") and a security agreement; the Note was secured by the Mortgage.

In its petition, Wells Fargo averred that "[t]he obligor has defaulted on the note and security agreement and mortgage by failing to pay, when due, the monthly installments required by the note and security agreement and mortgage." Wells Fargo further averred that it gave notice of default to the obligor, Betty Galloway.[1] Wells Fargo still further averred that it had exercised its right to accelerate, pleading as follows:

> Obligor has failed to timely pay all amounts required to cure their default, and plaintiff [Wells Fargo] has exercised its right to accelerate the entire indebtedness due on the note and security agreement and mortgage, including the monthly installment due February 19, 2009 and all successive monthly installments.

Wells Fargo prayed for a judgment for the "principal of $45,852.94 with interest thereon . . . from January 19, 2009, until paid."

In response, the Galloways filed various exceptions, including a peremptory exception of prescription.[2] The basis for their exception of prescription was the

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[1] The notice of default included the following six items:

1. The breach;
2. The action required to cure such breach;
3. A date not less than 30 days from the date the notice is mailed by which such breach must be cured;
4. A failure to cure such breach on or before the date specified in the notice would result in acceleration of sums secured by the mortgage;
5. That obligors had the right to reinstate after acceleration and the right to assert non-existence of the default or any other defense of obligors to acceleration and foreclosure;
6. That if the breach was not cured on or before the date specified in the notice, plaintiff could declare all of the sums secured by the mortgage to be immediately due and payable without further demand and that the property could be seized and sold to satisfy the indebtedness due.

[2] The Galloways also filed a peremptory exception of no right of action, arguing that the Mortgage was prescribed due to a failure to re-inscribe it timely. Wells Fargo replied that it re-inscribed the Mortgage on July 22, 2015, and cited La. C.C. art. 3365 in support of the argument that it continued to hold a security interest in the property. Denying the exception of no right of

five-year prescriptive period for actions on promissory notes in La. C.C. art. 3498. The Galloways contended that "the last payment made on the obligation alleged to have been created on August 14, 2002 was made by Betty Galloway on May 15, 2010. . . . [*N*]*o further payments were made on the note therefore the entire remaining obligation has prescribed*."

Wells Fargo countered that the Note was not prescribed because the Galloways had acknowledged the debt. Wells Fargo contended that in various correspondence between the parties after the date of Betty Galloway's last payment—May 15, 2010—the Galloways acknowledged the debt, which interrupted the prescriptive period. In the alternative, Wells Fargo contended that only the payments due more than five years before the suit was filed had prescribed.

Following a hearing, which was held on July 27, 2016, the trial court granted, in part, the exception of prescription. The trial court found that "anything due prior to April 7, 2011 [five years before the suit was filed] is hereby

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action, the trial court orally reasoned that "the re-inscription may have been late but that the law on re-inscription has to do with ranking, that once they re-inscribe they're entitled to have their debt recognized, the issue is whether that debt has any rank above certain other liens that exist on real property." The issue of ranking is not at issue in this case.

Although the Galloways indirectly re-urge their exception of no right of action by cross-referencing the exception they filed in the trial court, they fail to brief the issue. (The Galloways' sole assignment of error, cross-referencing the exception of no right of action, is quoted elsewhere in this opinion.). For this reason, this issue is not before us on appeal. *See* Uniform Rules, Courts of Appeal, Rule 2-12.4 (providing that "[t]he court may consider as abandoned any assignment of error or issue for review which has not been briefed."); *see also McMaster v. Progressive Sec. Ins. Co*., 14-0155, pp. 6-7 (La. App. 4 Cir. 10/29/14), 152 So.3d 979, 983 (citing Rule 2-12.4 and noting that "[i]t is also well settled that if an appellant identifies an assignment of error or an issue presented for review, but fails to brief that point with citations to the record and support in the law, that issue or assignment is deemed waived"). We thus confine our analysis to the peremptory exception of prescription.

prescribed, but all mortgage payments due on or after April 7, 2011 are deemed exigible." From this judgment, the Galloways appeal, contending that the trial court erred in failing to find the entire debt was prescribed. Before addressing the merits, however, it is necessary for us to address a jurisdictional issue.

JURISDICTIONAL ISSUE

"Before reaching the merits of an appeal, an appellate court has a duty to determine, on its own motion, whether subject matter jurisdiction exists." *Moulton v. Stewart Enters*., *Inc.*, 17-0243, 17-0244, p. 3 (La. App. 4 Cir. 8/3/17), 226 So.3d 569, 571 (citing *Moon v. City of New Orleans*, 15-1092, 15-1093, p. 5 (La. App. 4 Cir. 3/16/16), 190 So.3d 422, 425). Accordingly, we initially must determine whether the judgment granting in part and denying in part the Galloways' peremptory exception of prescription is properly before us on appeal.

This court's appellate jurisdiction extends to "final judgments." *Kirby v. Poydras Ctr., LLC*, 15-0027, 15-0391, p. 8 (La. App. 4 Cir. 9/23/15), 176 So.3d 601, 606 (citing La. C.C.P. art. 2083). "'[A] judgment that determines the entirety of the merits of the action is appealable under La.Code Civ.Proc. art. 2083, but a judgment that only partially determines the merits of the action is a valid partial final judgment (and therefore appealable) only if authorized by Article 1915.'" *Rhodes v. Lewis*, 01-1989, p. 3 (La. 5/14/02), 817 So.2d 64, 66 (quoting *Douglass v. Alton Ochsner Med. Found.*, 96-2825 (La. 9/13/97), 695 So.2d 953).

The right to appeal a partial final judgment is governed by La. C.C.P. art. 1915, which has two subparts. "Subpart A of La. C.C.P. art. 1915 designates

certain categories of partial judgments as final judgments subject to immediate appeal without the necessity of any designation of finality by the trial court." *Quality Envtl. Processes, Inc. v. Energy Dev. Corp*., 16-0171, 16-0172, p. 6 (La. App. 1 Cir. 4/12/17), 218 So.3d 1045, 1053. "Subpart B of La. C.C.P. art. 1915 provides that when a court renders a partial judgment, partial motion for summary judgment, or exception in part, it may designate the judgment as final when there is no just reason for delay." *Id.; see also Favrot v. Favrot*, 10-0986, pp. 2-3 (La. App. 4 Cir. 2/9/11), 68 So.3d 1099, 1102.

Subpart B of La. C.C.P. art. 1915 has two subparts. The first subpart provides that "the judgment shall not constitute a final judgment unless it is designated as a final judgment by the court after an express determination that there is no just reason for delay." La. C.C.P. art. 1915(B)(1). The second subpart provides that "[i]n the absence of such a determination and designation, any such order or decision shall not constitute a final judgment for the purpose of an immediate appeal and may be revised at any time prior to rendition of the judgment adjudicating all the claims and the rights and liabilities of all the parties." La. C.C.P. art. 1915(B)(2); s*ee also* La. C.C.P. art. 1911(B) (providing, in part, that "[n]o appeal may be taken from a partial final judgment under Article 1915(B) until the judgment has been designated a final judgment under Article 1915(B)").

The judgment the Galloways seek to appeal, which grants in part and denies in part their peremptory exception of prescription, is governed by Subpart B of La.

C.C.P. art. 1915.[3] Because the trial court did not certify the judgment as immediately appealable,[4] the judgment is thus not appealable.

"An appeal erroneously taken on a nonappealable judgment may be converted to an application for supervisory writ by the appellate court, but only when the motion for appeal has been filed within the thirty-day period allowed for the filing of an application for supervisory writ under Rule 4-3 of the Uniform Rules—Courts of Appeal." *Succession of Fanz*, 16-0180, pp. 6-7 (La. App. 4 Cir. 12/16/16), 208 So.3d 422, 428, *writs denied*, 17-0084 (La. 3/24/17), 216 So.3d 816; 17-0310 (La. 3/24/17), 217 So.3d 355.[5] In this case, the motion for appeal was filed within thirty days of the date of the notice of judgment. Accordingly, we

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[3] As in *Quality Envtl. Processes*, "[t]he judgment does not: (1) dismiss the suit as to any party; (2) grant a motion for judgment on the pleadings; (3) pertain to an incidental demand that was tried separately; (4) adjudicate the issue of liability; or (5) impose sanctions or disciplinary action." 16-0171, 16-0172, at p. 7, 218 So.3d at 1054; *see also Pottinger v. New Orleans Heating & Cooling Specialists, Inc*., 06-0701 (La. App. 5 Cir. 1/30/07), 951 So.2d 1224 (finding a judgment partially granting a peremptory exception of prescription is a partial final judgment governed by La. C.C.P. art. 1915(B)); *City of Baton Rouge v. American Home Assur. Co*., 06-0522, p. 4 (La. App. 1 Cir. 12/28/06), 951 So.2d 1113, 1116-17 (same).

[4] The parties did not request that the trial court designate the judgment as final for purposes of appeal pursuant to La. C.C.P. art. 1915(B).

[5] In *Mandina, Inc. v. O'Brien*, 13-0085 (La. App. 4 Cir. 7/31/13), 156 So.3d 99, this court noted that this court has exercised its discretion to convert an appeal of a non-appealable judgment into an application for supervisory writs when the following two conditions are met:

> (i) The motion for appeal has been filed within the thirty-day time period allowed for the filing of an application for supervisory writs under Rule 4–3 of the Uniform Rules, Courts of Appeal.
>
> (ii) When the circumstances indicate that an immediate decision of the issue sought to be appealed is necessary to ensure fundamental fairness and judicial efficiency, such as where reversal of the trial court's decision would terminate the litigation.

Id. at 13-0085 at pp. 7-8, 156 So.3d at 103-04; *see also McGinn v. Crescent City Connection Bridge Auth*., 15-0165, pp. 4-5 (La. App. 4 Cir. 7/22/15), 174 So.3d 145, 148; *Kirby v. Poydras Ctr., LLC,* 15-0027, p. 13, n. 9 (La. App. 4 Cir. 9/23/15, 13), 176 So.3d 601, 608.

exercise our discretion and convert this appeal to an application for supervisory writs.

DISCUSSION

The sole issue before us is whether the trial court erred in denying, in part, the Galloways' peremptory exception of prescription.[6] A peremptory exception generally raises a purely legal question. *See Metairie III v. Poche' Const., Inc.,* 10-0353, p. 3 (La. App. 4 Cir. 9/29/10), 49 So.3d 446, 449. Nonetheless, evidence may be introduced in the trial court to support or controvert a peremptory exception of prescription. *See* La. C.C.P. art. 931 (providing that "evidence may be introduced to support or controvert any of the objections pleaded, when the grounds thereof do not appear from the petition"). The standard of review of a trial court's ruling on a peremptory exception of prescription turns on whether evidence is introduced. *State v. Thompson*, 16-0409, p. 18 (La. App. 4 Cir. 11/23/16), 204

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[6] In their brief, the Galloways assign only one error, which they frame as follows:

> The Trial Judge was in error when she held that the installment payments due after April 7, 2011 had not prescribed and were deemed exigible. Under the terms of the note, the applicable law, and the admission by Wells Fargo as per their letter of May 21, 2010, that the entire note was in default, the Trial Judge should have held that the entire principal was due and exigible when the default occurred, therefore prescription began to run from the date of the default. Because Wells Fargo's suit was filed more than five (5) years after the default occurred, the entire balance of the note prescribed pursuant to the provisions of Louisiana Civil Code Article 3498 which establishes a five (5) [year] prescriptive period for actions on instruments, promissory notes, etc. Wells Fargo filed its suit against Appellants approximately 70 months and 21 days after the event of default—10 months and 21 days too late. Furthermore, for reasons set forth in the Galloways' Memorandum in Support of their Peremptory Exception of Prescription (ROA pages 37-39), the security interest securing the prescribed obligation also prescribed and all inscriptions should be cancelled. The Judgment of the Trial Court is in error because when a default occurs, future installments, i.e. installments which might otherwise have been payable on their respective dates are also retroactively due from the date of default. Once there is a default, such future payments do not have separate sequential prescription dates.

So.3d 1019, 1031 (citing *Miralda v. Gonzalez*, 14-0888, pp. 17-18 (La. App. 4 Cir. 2/4/15), 160 So.3d 998, 1009).

When no evidence is introduced, "the judgment is reviewed simply to determine whether the trial court's decision was legally correct." *Arton v. Tedesco*, 14-1281, p. 3 (La. App. 3 Cir. 4/29/15), 176 So.3d 1125, 1128. A *de novo* standard of review applies. In this context, "the exception of prescription must be decided on the facts alleged in the petition, which are accepted as true." *Denoux v. Vessel Mgmt. Servs., Inc*., 07-2143, p. 6 (La. 5/21/08), 983 So.2d 84, 88; *Ohle v. Uhalt*, 16-0569, p. 13 (La. App. 4 Cir. 2/1/17), 213 So.3d 1, 10.

When evidence is introduced, the trial court's factual findings on the issue of prescription generally are reviewed under the manifestly erroneous-clearly wrong standard of review. *Miralda*, 14-0888 at p. 17, 160 So.3d at 1009 (collecting cases). When evidence is introduced but the case involves no dispute regarding material facts, only the determination of a legal issue, an appellate court must review the issue *de novo*, giving no deference to the trial court's legal determination. *See Cawley v. National Fire & Marine Ins. Co*., 10-2095, p. 3 (La. App. 1 Cir. 5/6/11), 65 So.3d 235, 237. Likewise, "[w]hen the defense of prescription is raised by way of summary judgment, we review the resulting judgment *de novo*, 'using the same criteria used by the trial court in determining whether summary judgment is appropriate.'" *M.R. Pittman Grp., L.L.C. v. Plaquemines Par. Gov't*, 15-0860, p. 11 (La. App. 4 Cir. 12/2/15), 182 So.3d 312,

320 (quoting *Hogg v. Chevron USA, Inc*., 09-2632, 09-2635, p. 6 (La. 7/6/10), 45 So.3d 991, 997).

Ordinarily, the defendant—the party asserting a peremptory exception of prescription—bears the burden of proof. *Engine 22, LLC v. Land & Structure, LLC*, 16-0664, 16-0665, p. 5 (La. App. 4 Cir. 4/5/17), 220 So.3d 1, 5; *Felix v. Safeway Ins. Co.,* 15-0701, p. 4 (La. App. 4 Cir. 12/16/15), 183 So.3d 627, 630. When the plaintiff's claim is prescribed on the face of the petition, however, the burden shifts to the plaintiff to establish that his or her claim has not prescribed. *Spott v. Otis Elevator Co.,* 601 So.2d 1355, 1361 (La. 1992); *Engine 22*, 16-0664, 16-0665 at p. 5, 220 So.3d at 5.

When the plaintiff fails to allege specific dates in the petition, it cannot be determined whether the suit is prescribed on the face of the petition. *See Bureaus Inv. Grp. No. 2, LLC v. Howard*, 06-273, p. 5 (La. App. 5 Cir. 11/14/06), 947 So.2d 37, 39 (noting that "[t]he absence of proof of the dates the debts were incurred does not prove prescription on the face of the pleading"); *see also Cerullo v. Heisser*, 16-558, p. 4 (La. App. 5 Cir. 2/8/17), 213 So.3d 1232, 1235 (citing *Perret v. Louisiana Dep't of Public Safety and Corr*., 01-2837, p. 5 (La. App. 1 Cir. 9/27/02), 835 So.2d 602, 605) (noting that "when a plaintiff's petition does not contain specific dates for the conduct at issue, the petition is not prescribed on its face"). Conversely, when the plaintiff alleges specific dates, it can be determined whether the petition is prescribed on its face.

"Statutes regulating prescription are strictly construed against prescription and in favor of the obligation sought to be extinguished." *Mallett v. McNeal*, 05-2289, 05-2322, p. 5 (La. 10/17/06), 939 So.2d 1254, 1258. The applicable

prescriptive period is determined by the character of the action pled in the petition. *Starns v. Emmons*, 538 So.2d 275, 277 (La. 1989).

The governing prescriptive period in this case is the five-year period set forth in La. C.C. art. 3498, which provides as follows:

> Actions on instruments, whether negotiable or not, and on promissory notes, whether negotiable or not, are subject to a liberative prescription of five years. This prescription commences to run from the day payment is exigible.

"When a promissory note is payable in installments, as opposed to on demand, the five-year prescriptive period commences separately for each installment on its due date." *JP Morgan Chase Bank, N.A. v. Boohaker*, 14-0594, p. 10 (La. App. 1 Cir. 11/20/14), 168 So.3d 421, 428 (collecting cases). But, "if the installments are accelerated based upon a default, prescription for the entire accelerated amount commences on the day of acceleration. *Id*., 14-0594 at pp. 10-11, 168 So.3d at 428.

In analyzing a prescription issue, the proper place to begin is by analyzing the allegations of the petition. *See Lima v. Schmidt*, 595 So.2d 624, 628 (La. 1992).[7] Wells Fargo alleges in its petition that it exercised its option to accelerate the entire indebtedness due on the Note and Mortgage "including the monthly installment due February 19, 2009 and all successive monthly installments." We interpret the allegations in the petition to mean that the Note and Mortgage were

[7] The parties dispute when the acceleration occurred. According to Wells Fargo, "there is nothing in the record that indicates Wells Fargo accelerated all amounts owed under the note and mortgage until it filed the instant foreclosure proceeding on April 7, 2016." Wells Fargo thus contends that the trial court correctly held that each installment payment has its own prescriptive period and that only those installments due before April 7, 2011 have prescribed. The Galloways, on the other hand, contend that the entire obligation was accelerated either in May or June of 2010. In support, they point out that Betty Galloways made her last payment in May of 2010. They also refer to a letter, dated May 21, 2010, in which they contend that Wells Fargo admitted that the entire Note was in default. Because we decide this case based on the allegations of the petition, we need not resolve this dispute to dispose of the prescription issue.

past due as of February 19, 2009. In so interpreting the allegations of the petition, we find the following reasoning in the *JP Morgan Chase Bank* case instructive:

> The promissory note in the present case . . . required monthly payments through June 1, 2006, at which time the Boohakers were obligated to pay any remaining principal and accrued interest in a single payment, sometimes referred to as a "balloon payment." The note gave the payee the right to accelerate the indebtedness in the event of a default. Although Chase submits that there is no evidence that the acceleration clause was exercised, Chase alleged in its petition that it "has exercised its option to formally declare said indebtedness to be in default and accelerate all sums due thereunder." However, with respect to the date of default, the necessary event to trigger an acceleration, the petition alleges that the note "is past due since June 1, 2006." Consequently, the due date for the balloon payment and the alleged date of default prompting the acceleration are the same: June 1, 2006. This suit was filed within five years of that date on June 1, 2011.

JP Morgan Chase Bank, 14-0594 at p. 11, 168 So.3d at 428-29.

An analysis of the petition establishes that the date of the acceleration in this case was February 19, 2009. This suit, however, was not filed until April 7, 2016, more than five years beyond the date of the acceleration. This suit is prescribed on the face of the petition. The burden of proof on the exception of prescription thus shifted to Wells Fargo to establish that its claim had not prescribed. Although a hearing was held on the exception, Wells Fargo failed to present any evidence to establish an interruption or suspension of prescription. Wells Fargo thus failed to meet its burden of proof.

Given our finding that Wells Fargo's claim is prescribed on the face of the petition and that Wells Fargo failed to meet its burden of proof, the issue of whether the Galloways introduced any evidence at the hearing has no bearing on

the outcome of this appeal. For this reason, we deny the Galloways' motion to remand to the district court for the taking of additional evidence.[8]

Summarizing, the applicable standard of review in this case is the *de novo* standard as the allegations of the petition form the basis for our decision. Given this suit is prescribed on its face, the trial court legally erred in denying, in part, the exception of prescription. Nonetheless, the jurisprudence construing La. C.C.P. art. 934[9] dictates that we remand to allow Wells Fargo an opportunity to amend its petition, if it can do so, to cure the exception. *See Wyman v. Dupepe Const*., 09-0817, p. 1 (La. 12/1/09), 24 So.3d 848, 849 (instructing that "when a court sustains an exception of prescription, it should permit amendment of the plaintiff's pleadings if the new allegations which the plaintiff proposes raise the possibility the claim is not prescribed, even if the ultimate outcome of the prescription issue, once the petition is amended, is uncertain").

The present procedural posture of this case, however, is somewhat unusual. After the trial court rendered its judgment granting, in part, the Galloways' exception of prescription, Wells Fargo filed a motion to amend its petition, which

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[8] After the lodging of this appeal, the Galloways filed a Motion to Remand to the Trial Court (the "Motion"). In the Motion, the Galloways contend that the transcript of the July 27, 2016, hearing that was provided to this court is incomplete because it omits the following two items: (i) the testimony of Betty Galloway and her daughter, Valerie Sennette Galloway; and (ii) the exhibits introduced by the Galloways' attorney at the end of the hearing, which were "two or three letters from Wells Fargo." The allegedly omitted evidence thus consists solely of evidence the Galloways sought to introduce in support of their prescription exception. Even assuming, *arguendo*, that the record is incomplete, we find a remand for completion of the record is unwarranted given that the burden was on Wells Fargo to establish its claim was not prescribed coupled with our finding that it failed to meet its burden.

[9] La. C.C.P. art. 934 provides that "[w]hen the grounds of the objection pleaded by the peremptory exception may be removed by the amendment of the petition, the judgment sustaining the exception shall order such amendment within the delay allowed by the court."

the trial court granted.[10] The amended petition is not properly a part of the record of this appeal. Furthermore, the trial court lacked jurisdiction to allow Wells Fargo to amend its petition while this matter was pending before this court as an appeal. *See* La. C.C.P. art. 2088(A) (providing for the divesting of the trial court's jurisdiction of "all matters in the case reviewable under the appeal" with certain exceptions inapplicable here). Given these circumstances, we remand to the trial court with instructions to allow Wells Fargo to re-file an amendment to its petition, within the time allowed by the trial court, to allege facts that would show its claims are not prescribed.

DECREE

For the foregoing reasons, we convert the appeal to an application for supervisory writ; grant the writ; reverse the trial court's judgment denying, in part, the exception of prescription; and remand with instructions to allow Wells Fargo to re-file an amendment to the petition. We deny the Motion to Remand.

APPEAL CONVERTED TO WRIT; WRIT GRANTED; JUDGMENT REVERSED AND REMANDED WITH INSTRUCTIONS; MOTION TO REMAND DENIED

[10] Wells Fargo amended the pertinent provision of its petition to provide as follows: "[t]he Obligors failed to timely pay all amounts required to cure default, and plaintiff has exercised its right to accelerate the entire indebtedness due on the note and mortgage, including the monthly installment due April 19, 2011, and all successive installments." Wells Fargo also amended its prayer for relief to read: "[p]rincipal of $45,852.94 with interest thereon at 13.06% per annum from March 19, 2011, until paid."