2019 IL App (2d) 170659-U
No. 2-17-0659
Order filed February 1, 2019

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IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

MB FINANCIAL BANK, N.A., as Successor-in-interest to Broadway Bank,	)	Appeal from the Circuit Court of Lake County.
Plaintiff-Appellee,	)	
v.	)	No. 11-CH-2829
CHICAGO TITLE LAND TRUST CO., As successor trustee to LaSalle Bank National Association, as successor trustee To American National Bank & Trust Co., As trustee u/t/a dated May 25, 1999, as trust No. 125087-0-1; and JOYCE SWEEN,	)	Honorable Luis A. Berrones,
Defendants-Appellants.	)	Judge, Presiding.

JUSTICE JORGENSEN delivered the judgment of the court.
Justices McLaren and Spence concurred in the judgment.

ORDER

¶ 1 *Held*: We vacate the trial court's partial grant of summary judgment to the lender bank and remand for trial. Defendants presented a genuine issue of material fact on their first affirmative defense that the bank was not entitled to rely on the land trustee's signature on the mortgage, because the bank had notice of an underlying forgery. We also vacate the deficiency judgment against the mortgagor. On remand, if the court determines after a trial that the bank *was* entitled to rely on the trustee's signature, there is no need to revisit defendants' second affirmative defense that the mortgage was not supported by consideration. Vacated and remanded.

¶ 2 Appellee, MB Financial Bank, N.A., as successor-in-interest to Broadway Bank (both hereinafter the Bank, where appropriate), had two mortgages against a property held in a land trust (u/t/a dated May 25, 1999, as trust number 125087-0-1) (the land trust). In 2006 and 2007, the land trust trustee, co-appellant Chicago Title Land Trust Company, had entered into the mortgages based on letters of direction purportedly signed by the land trust beneficiary, co-appellant Joyce Sween (both hereinafter defendants, where appropriate). Under the mortgages and related notes, the land trust property, Joyce's $300,000 Riverwoods home, would serve as collateral to issue $1,025,000 and $150,000 loans to Joyce's daughter, Terri Sween, and her life and business partner, Ronald Rooding (the Roodings). The majority of the 2006 loan, around $900,000, would be used to purchase an Antioch home. The remaining proceeds from the 2006 loan would be placed in the Roodings' business account. The 2007 loan established a line of credit for the Roodings.

¶ 3 In 2010, Broadway Bank went into receivership and the loans went into default. The trial court entered judgments of foreclosure and sale in favor of Broadway's successor, MB Financial. The court later confirmed the sale and entered deficiency judgments against Joyce and the Roodings. Defendants' theory of the case is that the Roodings forged Joyce's signature and Broadway Bank allowed it to happen, had reason to know of it, and is not entitled to the status of an innocent third party when determining who should bear the costs of the forgery.

¶ 4 Defendants now challenge the trial court's earlier rulings that upheld the validity of the mortgages: (1) its partial grant of summary judgment to the Bank, having found no genuine issue of material fact that the Bank had reason to know of Joyce's forged signature on her letter of direction to Chicago Title to enter into the mortgages; and (2) its determination following a trial that the mortgages were supported by valid consideration.

¶ 5 As we will explain, a letter of direction is from the land trust beneficiary to the land trustee. A mortgage, in contrast, is between the trust and the third-party lender. Where a land trustee acts on a forged letter of direction from the beneficiary to enter into a mortgage with a third-party bank, the bank may rely on the trustee's signature on the mortgage as a warranty that the trustee was authorized to enter into the transaction. Any damages that a beneficiary may suffer from the unauthorized mortgage transaction must be pursued against the trustee. An exception to the general rule applies where the third-party bank had notice of infirmities in the letter of direction and the trustee's authority to act, such that the third-party bank should not be entitled to rely on the trustee's signature on the mortgage.

¶ 6 Here, we determine that defendants raised a genuine issue of material fact as to whether the Bank was entitled to rely on the trustee's signature. Also, the trial court appeared to apply an erroneously high standard for the Bank's involvement (repeatedly commenting that the Bank itself did not commit the forgery), improperly made credibility determinations and weighed the evidence at the summary judgment stage, calling the loan officer "honest" and discounting the relevance of certain evidence. Therefore, the trial court should not have granted partial summary judgment to the Bank on the question of its involvement with an alleged forgery. However, *as framed on appeal*, we do agree with the trial court's decision that the mortgages were supported by valid consideration.

¶ 7 A twist comes, though, in that the two separate bases offered by defendants to invalidate the mortgage—the forgery issue and the consideration issue—became intertwined at the trial on the consideration issue *as that issue was framed below*. Therefore, we must determine whether evidence adduced at the trial on the consideration issue, and the trial court's corresponding findings, now dictate the outcome on the first issue that we would have otherwise sent back for

trial. More specifically, at the trial on the consideration issue, defendants argued that there was no consideration because Joyce was a "stranger to the transaction," *i.e.*, she never signed the letter of direction. Defendants used their "stranger" argument as a means to re-submit the question of forgery after the trial court had, wrongly in our view, found no evidence to substantiate the first issue at the summary judgment phase. The trial court found, on the evidence presented, that there was no forgery. Although defendants abandon the "stranger" argument on appeal, we still must address the trial court's findings.

¶ 8 We determine that the trial court's ancillary determination of "no forgery" does not render moot that question as it was framed in the first issue. At the start of the consideration hearing, the trial court limited the evidence that would be permitted: "The whole forgery thing has been put aside now because I've ruled—I've made certain rulings," and "[W]e're not going to go astray on this whole whether she signed it or not, or it was forged or not." The court did allow defendants to touch on the question of forgery where it directly supported the consideration argument, but it never allowed a full and fair hearing on the question of forgery. Because the question of forgery and the Bank's involvement, if any, has not yet been examined at trial, we remand for the court to conduct a trial on the first issue.

¶ 9 Finally, we vacate the deficiency judgment. Vacated and remanded.

¶ 10 I. BACKGROUND

¶ 11 Joyce, born in 1937, held a Ph.D. from Northwestern University in public policy. As of 2016, she continued to teach at DePaul University and helped with their internship program. Prior to 1999, she lived in a two-story home in Highland Park. In 1999, she broke her pelvis, and she began looking for a ranch home.

¶ 12 In 1999, Joyce purchased the Riverwoods property, a ranch home, for approximately $290,000. She purchased the home to live in, which she did, for at least five years. Sometime between 2006 and 2008, while she was in Florida, the home flooded. She repaired the property, and, at Terri's suggestion, rented it to a "young couple." When it was time for Joyce to move back into the home, she could not, because she was in the hospital with pneumonia. After that, the Bank initiated foreclosure proceedings. She did not live in the property again. (Instead, she returned to her Highland Park home.)

¶ 13 From the beginning, the property was held in the land trust. The original mortgage was held by Broadway Bank, with Gloria Sguros serving as the "point person." Joyce agrees that she signed all relevant letters of direction relating to the original mortgage and its modifications. These signings occurred between 2000 and 2005. Each time, Joyce went to the Bank to sign the documents in person.

¶ 14 The Bank asserts that, on March 7, 2006, Joyce, as the beneficial owner of the Riverwoods property, signed a letter of direction to Chicago Title, as trustee, instructing it to sign a second mortgage in favor of Broadway Bank for the Riverwoods property. The authenticity of her signature, and others to follow, are at the center of this case. We refer to this as the 2006 primary letter of direction. Chicago Title entered into the mortgage. The Riverwoods property would be collateral for a $1,025,000 loan from Broadway Bank to the Roodings.

¶ 15 That same day, the Roodings borrowed the $1,025,000 from Broadway Bank, with an interest rate of 9.5%. They signed a promissory note and a business loan agreement for the same amount. The note and agreement stated:

> "Out of the total loan amount of $1,025,000, an amount of $130,000 will be disbursed at closing of the loan and placed in a non-interest bearing escrow account at

> Broadway Bank for the purpose of interest reserve for the payment of monthly interest. The remaining funds, or $895,000, will be disbursed for the purchase of the property at 17173 Edwards Road, Antioch, IL."

¶ 16 The Bank further asserts that, on February 12, 2007, Joyce signed a new letter of direction to Chicago Title, instructing it to sign a third mortgage in favor of Broadway Bank for the Riverwoods property. We refer to this letter as the 2007 primary letter of direction. Chicago Title entered into the mortgage. This time, the Riverwoods property would serve as collateral for a $150,000 loan from Broadway Bank to the Roodings.

¶ 17 That same day, the Roodings borrowed $150,000 from Broadway Bank. They signed a promissory note and a business loan agreement for the same amount. The note and agreement provided that the $150,000 would be used to establish a line of credit, from which only Terri and Rooding would be authorized to draw.

¶ 18 The 2006 and 2007 notes were later modified by five change-in-terms agreements (CTAs). Two CTAs modified the 2006 note, and they are less critical to this appeal. The first, signed by the Roodings, increased the principal loan amount by $10,248, to $1,035,248. The second, signed by the Roodings, changed several terms of the loan not at issue here.

¶ 19 Three CTAs modified the 2007 note, and they are critical to this appeal. The first, signed by the Roodings, increased the principal loan amount by $25,000, to $175,000. The second, most critical, signed by the Roodings *and purportedly by Joyce*, increased the principal loan amount by $50,000, to $225,000, *and added Joyce as a borrower*. (This meant that, in addition to losing the Riverwoods property if the Roodings failed to repay the $225,000, Joyce was responsible for repayment of the $225,000 itself.) The third, signed by the Roodings and purportedly by Joyce, added Chicago Title as a borrower.

¶ 20 Each CTA was precipitated by a letter of direction, purportedly signed by Joyce. We refer to these letters as secondary letters of direction. Pursuant to each of the secondary letters of direction, Chicago Title executed a modification of mortgage.

¶ 21 All of these primary and secondary letters of direction shared certain commonalities. All but the last two secondary letters of direction named only the Roodings as borrowers. A borrower, by definition, receives the loan proceeds. Inconsistent with naming the Roodings as borrowers and with attaching for execution the unsigned mortgage and note that named the Roodings as borrowers, each letter of direction instructed that the loan proceeds go to Joyce, individually, and that Chicago Title issue a pay proceeds letter directing Broadway Bank to pay the loan proceeds to Joyce. The one-line instruction that the proceeds go to Joyce is inconsistent with the rest of the letter and its attachments that name the Roodings as borrowers. It is also inconsistent with the terms of the actual mortgage and notes, which name the Roodings as borrowers.

¶ 22 The 2006 primary letter of direction bears Sguros' signature under the words "consented to." Although the Bank is not a party to the letter of direction, Sguros would strongly imply in her deposition testimony that her signature meant that she, a loan officer, witnessed Joyce sign the letter of direction. Sguros also "consented to" several of the related letters of direction. One letter of direction was signed by a different loan officer, Vinit Shah. A loan officer's signature on a letter of direction is not legally necessary, because the letter of direction is between the beneficiary and the trustee.

¶ 23 Indeed, no loan officer signed the 2007 primary letter of direction. And, no loan officer signed the critical secondary letter of direction that increased the principal loan amount of the line of credit by $50,000, to $225,000, and added Joyce as a borrower. That letter of direction

was dated May 15, 2008. That same day, Sguros faxed to Joyce a copy of a $50,000 check. The check was stamped: "Copy—Not Negotiable." The check was made out to three people: Terri, Rooding, *and Joyce*. It had already been endorsed by Terri and Rooding. It was back-dated two years to May 15, 2006. (The Bank stated in a later pleading that the 2006 date was a mistake.) According to Joyce, Sguros told her via telephone that she needed Joyce's signature on the check for record-keeping purposes. Joyce thought it was strange, but, given that the check was two years old, she signed the faxed copy. She did not sign the actual check. She trusted Sguros and did not think much about signing a non-negotiable copy of a back-dated check. She did not know the check had anything to do with the 2007 loan. The record contains the copies of the faxes, dated May 15, 2008, and a copy of the check, dated two years earlier, May 15, 2006. The parties would later agree that the check was deposited into the Roodings' account to the exclusion of Joyce. The date on the deposit slip was, again, May 15, 2008. The deposit appeared in the Roodings' account on May 16, 2008. The actual hard copy of the check was endorsed only by Terri and Rooding at the time it was deposited. Dustin Ackman, of MB Financial (Broadway's successor), would later testify that that is not how MB Financial operates. Absent rare exception, Ackman would require all three signatures. Here, Ackman knew of no such exception.

¶ 24 In April 2010, the Illinois Department of Financial and Professional Regulation-Division of Banking closed Broadway Bank. The Federal Deposit Insurance Corporation (FDIC) was appointed receiver. The FDIC subsequently sued Broadway Bank, Sguros, and eight other loan officers for gross negligence in underwriting practices during the years in question here. *Federal Deposit Insurance Corporation v. Giannoulias*, 918 F. Supp. 2d 768 (2013) (defendants' motion to dismiss denied). Later in April 2010, MB Financial entered into a purchase and assumption

agreement with the FDIC. Through the agreement, it acquired many of Broadway Bank's assets, including the loans at issue here.

¶ 25 On May 10, 2010, when Joyce read in the newspaper that Broadway Bank was going into receivership, she was "upset" and "worried." She "rushed" to the bank to pay off the remainder of her 1999 mortgage in full. She believed the 1999 mortgage to be the only encumbrance on the property. She paid approximately $100,000, which she obtained by selling stocks. She thought she owned the home "clear" at that point. She first learned that additional mortgages, relating to the 2006 and 2007 loans, had been placed on her home when a sheriff served her with the instant complaint for foreclosure.

¶ 26 On December 6, 2010, MB Financial declared that the entire balance due under the 2006 and 2007 loans was immediately due and payable. It wrote a letter to the Roodings, demanding full payment of the debt remaining on the $1,025,000 loan, stating that no payments had been made since April 2010. It also wrote a letter to the Roodings and Joyce, demanding full payment of debt remaining on the $225,000 loan, stating that no payments had been made since April 2010. That letter was sent via regular mail to the Riverwoods property.

¶ 27 On June 17, 2011, MB Financial filed an eight-count verified complaint to foreclose mortgages and for other relief against the Roodings, Joyce, and Chicago Title. Counts I and II are most relevant to this appeal. In count I, the Bank sought to foreclose on the 2006 mortgage. It alleged that, as of April 15, 2010, the loan was in default, with a remaining principal balance of $1,020,527 and, with fees and interest, a total due of $1,228,787, with a default interest rate of 18%, or $510 per day. The Bank sought to foreclose and sell the Riverwoods property, and it sought a deficiency judgment against the Roodings but *not* Joyce, who had not been a borrower on the 2006 note, which was secured by the 2006 mortgage.

¶ 28 In count II, the Bank sought to foreclose on the 2007 mortgage. It alleged that, as of April 23, 2010, the loan was in default, with a remaining principal balance of $224,598 and, with fees and interest, a total due of $270,360, with a default interest rate of $18%, or $112 per day. The Bank sought to foreclose and sell the Riverwoods property, and it sought a deficiency judgment against the Roodings *and Joyce*, who had become a borrower on the modified 2007 note, which was secured by the 2007 mortgage.

¶ 29 Counts V and VI are also relevant to this appeal. Count V was against Chicago Title, for breach of the 2007 note and sought corresponding damages of $270,360. Count VI was against Joyce, for breach of the 2007 note and sought corresponding damages of $270,360. Again, CTAs were made on the 2007 note that added Joyce and the land trust as borrowers.

¶ 30 Counts III and IV were against Ronald and Terri, respectively, for breach of the 2006 note and sought corresponding damages in the amount of $1,228,787. Counts VII and VIII were against Ronald and Terri, respectively, for breach of the 2007 note and sought corresponding damages of $270,360.

¶ 31 On December 12, 2011, defendants answered the complaint. They denied that Joyce had authorized Chicago Title to enter into either mortgage or make any of the subsequent modifications. Defendants set forth three affirmative defenses.

¶ 32 First, they alleged that Joyce never authorized Chicago Title to take any action in relation to the case at bar (and her signatures on the letters of direction were forged):

> "Pursuant to the terms of the Land Trust, the Land Trust had no authority to execute any mortgage or note on behalf of the Land Trust absent a written direction from Joyce Sween. Prior to the filing of the instant action, Joyce Sween had never seen any

mortgage or note that is the subject of the action at bar. Joyce Sween never approved or authorized any action on behalf of the Land Trust in relation to the action at bar.

On information and belief, Gloria Sguros, a vice-president of Broadway Bank, engineered the execution of the letters of direction to the Land Trust, purportedly from Joyce Sween authorizing the execution of certain documents. On information and belief, these were written directions to the Trust that encumbered the Land Trust property as security for business debt owed to Broadway Bank by Rooding and [Terri]."

¶ 33 Second, and related, they alleged that Joyce's signatures on the final two 2007 secondary CTAs, which added her and Chicago Title as borrowers, were forged.

¶ 34 Third, they alleged that neither Joyce nor the land trust received any consideration for the 2006 and 2007 encumbrances on her Riverwoods property. In their view, Joyce and the land trust were mere strangers to the transaction between Broadway Bank and the Roodings. Joyce did not authorize the loans, and she did not receive the proceeds.

¶ 35 Joyce submitted a deposition and affidavit. In it, she testified consistent with the facts set forth above. Specifically, a majority of Joyce's deposition testimony consisted of her review of the various documents related to this case. She reviewed her original 1990s mortgage and trust documents. She agreed that she had signed them. Regarding her signatures on the original mortgage documents, she stated: "It could be, but I don't know [if it is my signature]," "It could be mine," and "My signature looks kind of crazy."

¶ 36 When she reviewed what were alleged to be her signatures on the documents at issue in this case, such as the letters of direction, she stated: "It doesn't look like my signature, even," and "No, no, my signature doesn't look like that, I don't think," and "It looks somewhat like my signature, but I never signed a document like this."

¶ 37 Regardless of the signatures' appearance, Joyce emphatically denied signing the documents at issue in this case: "I know I never signed this. I know that," "No, absolutely not," "No. This has been a shock for me," "Is that my signature? I don't remember. I'm sure I never signed a document like this. Oh, this is a letter of direction. No, never signed that," and "I never authorized the trust company to sign anything [pertaining to the 2006 and 2007] mortgages."

¶ 38 Joyce admitted to making two payments on the loans, for $10,000 and $34,000 respectively. According to Joyce, her daughter, who is her only living child, asked for help. Joyce went into the Bank to make the payments. Sguros told her what loan number to put on the checks. Joyce thought she was paying her daughter's debt. She did not realize that the debt encumbered her own property. Joyce's signature on these two checks would later be used as a comparison to the allegedly forged signatures.

¶ 39 Finally, Joyce acknowledged that she made payments on several invoices generated from the trustee's work on the 2006 and 2007 mortgages. These invoices ranged from $60 to $300. She did not look at them carefully. She knew she had a relationship with her trustee, so she paid the company for what she presumed to be legitimate work, still unaware that a new encumbrance had been placed on the Riverwoods property.

¶ 40 On September 19, 2013, MB Financial moved for summary judgment against Joyce and Chicago Title. The court denied the motion, determining that Joyce's deposition and affidavit raised a genuine issue of material fact as to whether she authorized Chicago Title to encumber the Riverwoods property and whether Sguros was involved in the letter-of-direction forgeries. The court also determined that there was a genuine issue of material fact as to whether Joyce signed the final two 2007 secondary CTAs, which added Joyce and Chicago Title as borrowers. It rejected MB Financial's argument that it did not matter whether Joyce signed the CTAs,

because she ratified them when she "signed" the $50,000 check. The court explained that Joyce did *not* testify that she signed the $50,000 check. Rather, she signed a fax sent to her by Sguros. The fax in the record supported Joyce's account. The funds were deposited in the Roodings' business account without Joyce's endorsement. The court did not comment on Joyce's consideration defense.

¶ 41 A. Summary Judgment: Forgery and the Bank's Awareness

¶ 42 On April 10, 2015, the Bank again moved for summary judgment against Joyce and Chicago Title on counts I and II only, which is the subject of the first issue on appeal. It dismissed count V, which had sought a deficiency judgment against Chicago Title. Also, it wrote in its memorandum in support of its motion for summary judgment: "Plaintiff is no longer seeking judgment against Joyce for the breach of the Final 2007 Note. A motion to dismiss count VI of the complaint has been filed concurrently herewith." (The record does not contain a motion to dismiss count VI.) Finally, it again assured Joyce that it would not pursue a deficiency judgment against her, writing: "Plaintiff is not seeking to hold Joyce liable under the 2007 note and is not pursuing a deficiency judgment against her on count II [which concerns the 2007 mortgage securing the 2007 note]."

¶ 43 The only new evidence as compared to the prior motion for summary judgment was Sguros' deposition. Sguros had testified as follows. Sguros began working at Broadway Bank in 1995. She began in loan administration. In 1998, she became a senior loan officer. From then on, she "pretty much [ran] the loan operation for Broadway Bank." She worked with "a lot" of land trusts over the years and was "very familiar" with land trusts. Sguros understood that a letter of direction is a direction from the beneficiary to the trustee. A beneficiary's signature on a

letter of direction need not be notarized, unless required by the terms of the trust, because a letter of direction is not recorded.

¶ 44 Joyce and the Roodings had a long-term relationship with the Bank, which preceded her employment. Sguros believed Joyce to be over 60 years old, but she never witnessed Joyce have a memory lapse.

¶ 45 First, Sguros testified that she remembered Joyce signing the 2006 letter of direction in front of her. Then, she testified that she could not remember any one specific signing *per se*, but she was "positive" that Joyce had signed the letters of direction in front of her. She just could not match a specific memory to each of the letters of direction. The following exchanges are taken from Sguros' testimony on the topic:

> "Q. Did Mrs. Joyce Sween ever come to Broadway Bank to sign any of these documents regarding this loan and the property that you can recall?
>
> A. Yes.
>
> Q. How many times do you think?
>
> A. And I would say with all the transactions, I have dealt with Joyce Sween maybe nine or ten times."

And,

> "Q. So you said Joyce Sween was in the bank many times, but you don't have a specific recollection of her signing any of these; do you?
>
> A. I do have a specific recollection. I just don't know what date.
>
> Q. Okay. Where was she sitting when she signed them?
>
> A. In front of me."

And,

"Q. Could you possibly be mixing up her presence in the bank signing those documents for that older loan [the original 1990s mortgage on the Riverwoods property]?

A. No."

And,

"Q. Are you positive, as you sit here today, that you have seen Ms. Sween sign at least one letter of direction to the land trust regarding the [Riverwoods] property and the loans that are at issue in this lawsuit?

A. Yes."

¶ 46 Further, Sguros strongly implied that when she, or any loan officer, "consented" to the letter of direction, it not only meant that the Bank would ultimately agree to the attached mortgage contracts, but also that a loan officer had witnessed the beneficiary's signature. For example, one of the secondary letters of direction was consented to by a different loan officer at the bank, Vinit Shah. When asked whether she could verify Joyce's signature on that letter of direction, Sguros answered, "No, because I wasn't even the loan officer." Sguros also stated that she and Joyce did not need to sign the letter of direction at the same time: "It could be signed [by a loan officer] simultaneously when she signed the document. It could be signed [by a loan officer] when she left the bank."

¶ 47 Sguros testified that the Roodings could not have forged Joyce's signature outside the Bank's presence:

"Q. Is it possible [the Roodings] might have been able to sign her name and you would not have known it?

A. No.

Q. Why is that not possible?

A. Because 99.9 percent, if I have a renewal, they would sign in front of me, and they are very—and between Joyce Sween, Ron Rooding, and Terri Sween, they are in and out of the bank. A lot of our employees, they are familiar with Terri Sween and Joyce Sween and Ron Rooding."

And,

"Q. In your experience, did you ever give documents to a borrower to have signed by his wife or a third-party borrower and brought in?

A. No, sir. Well, as an example, if we have a borrower that is a husband and wife, we want to make sure that the wife comes to the bank and signs in front of us. We *never* give the documents for them to sign because we have no proof that that person signed the documents or not. That's not our procedure, and especially [not] my procedure." (Emphasis added.)

¶ 48 Later, when pressed, Sguros was unable to recall whether she had ever given documents to Rooding or Terri to bring home to Joyce for her to sign:

"Q. Did you ever give Ronald Rooding loan documents for him to bring home for Joyce Sween to sign?

A. Not me personally. I don't recall.

Q. You personally.

A. I don't recall I ever did it.

Q. So is that a 'yes' or a 'no' or a 'I don't recall'?

A. I just don't recall.

Q. Did you ever give loan documents to Terri Sween to bring back to Joyce Sween to sign?

A. I don't recall.

Q. You just don't recall. Okay."

¶ 49 Sguros did not testify consistently as to whether it was possible for a beneficiary to instruct a trustee without the Bank's knowledge or consent. First, she testified that it was possible that a beneficiary could FedEx a letter of direction to the trustee without the Bank's knowledge. Later, she testified that, in practice, if the Bank did not consent to the letter of direction, the trustee would not execute the instructions and attached mortgage documents.

¶ 50 Sguros testified to the $10,228 payment that Joyce made on the loan. However, she acknowledged it was possible that Joyce thought she was paying her daughter's loan:

"A. She wrote the check to the bank.

Q. What check?

A. The check that we just saw right now, for $10,228.

Q. Okay. She has alleged that she was helping out her daughter and she wrote a check for her. Is that possible?

A. That's possible."

¶ 51 Sguros did not remember the incident in 2007, when she faxed a non-negotiable copy of the back-dated $50,000 check to Joyce and asked Joyce to sign the copy. However, when shown a copy of the faxes, sent from her and returned to her, she did not deny that it happened: "I don't recall, but I'm seeing this now."

¶ 52 Finally, Sguros testified that she herself did not forge Joyce's signature:

"Q. Ms. Sguros, there have been allegations in this case that you forged the name Joyce Sween on this document. Did you sign Joyce Sween's name to this document?

A. No, ma'am.

Q. Are you sure?

A. I'm positive.

Q. Why would such allegations have been made? Do you have any idea?

A. I have no idea."

¶ 53 At the hearing, defendants argued that *Chrystyan v. Feinberg*, 156 Ill. App. 3d 781 (1987), controlled. In *Chrystyan*, the court held that a letter of direction that contained a forged signature of one joint tenant and that instructed the trustee to convey property to the second joint tenant, was *void*, as was the subsequent deed. *Id*. at 784-85. Defendants read *Chrystyan* to mean that any deed or contract executed by the trustee following a letter of direction that contains the unauthorized and forged signature of its beneficiary is void.

¶ 54 MB Financial argued that *Chrystyan* did not apply, and that *In re Marriage of Gross*, 324 Ill. App. 3d 872 (2001), and *Grot v. First Bank of Schaumburg*, 292 Ill. App. 3d 88 (1997), controlled. In its view, defendants read *Chrystyan* too broadly. Voiding the letter of direction worked in *Chrystyan*, because, there, only parties to the trust, *i.e.*, the beneficiaries and the trustee, were involved in the conveyance. In the instant case, the trustee entered into a mortgage contract with, according to MB Financial, an innocent lender.

¶ 55 Per *Gross*, a lender is entitled to rely on the trustee's representation that it is authorized to enter into the mortgage. *Gross*, 324 Ill. App. 3d at 875-76 ("The single warranty or representation that a trustee makes upon execution of documents is that it has the power and authority to appropriately execute the instruments"). In *dicta*, the *Grot* court explained that a lender was only entitled to rely upon a trustee's signature if it had no "notice of infirmities." *Grot*, 292 Ill. App. 3d at 92. The *Grot* court noted that, absent notice of infirmities, the equities would seem to be with the lender. *Id*. In *Grot*, as here, the actual documents, the mortgage and

note, were not forged. *Id*. at 93. And, the beneficiary, by virtue of setting up a trust, had chosen to dispense with the necessity of his signature on the mortgage and note. *Id*. In the event of a forged letter of direction, the beneficiary's cause of action would be against the trustee, not the lender. *Id*.

¶ 56 MB Financial conceded that *Gross* and *Grot* would not apply if the Bank had "reason to know" that the letters of direction were forged. In this vein, MB Financial stated at the hearing:

> "[I]f Broadway Bank was involved in the forgeries, *then obviously we had reason to know* the land trustee's signature was not [the result of a legitimate letter of direction]. *So it would take us out of the line of cases* that we could rely on the land trustee's signature [when entering into a mortgage or other transaction involving the title of the property]. But we weren't involved." (Emphases added.)

¶ 57 The court accepted, for the purpose of summary judgment, that Joyce never signed the letters of direction or the 2007 secondary CTAs, and that her signatures were forged: "I'll assume that your client is truthful and in fact she didn't sign it and it's a forgery."

¶ 58 However, the court agreed with MB Financial that, to prevail in their affirmative defense, defendants would have to show not only that Joyce's signature was forged but that Broadway Bank was "involved in" the forgeries. The court determined that there was no genuine issue of material fact as to whether Sguros was involved in the forgeries:

> "I think Sguros is very definitive that she did not forge the signatures. I think that the alternative you have is to show that somehow [she] facilitated this knowingly. And I don't think there's any evidence of that that's been presented.
>
> I think the fact that Ms. Sguros' testimony is that she doesn't recall and then at points may be vague, doesn't get you there. I think that as I read the deposition transcript

> and then some of the comments that you made as far as characterizing her testimony, I think that in fact while she may have changed her testimony a couple of times, it's people catching themselves saying, you know what, this is really what happened. Now I remember. Or being frankly *honest* about what went on." (Emphasis added.)

And,

> "[Sguros was asked], there have been allegations *** that you forged the name Joyce Sween on this document. Did you sign Joyce Sween's name to this document? No ma'am. Are you sure. I'm positive.
>
> How more definite can you get? You know the other issues that you raise are frankly *I would interpret as her being honest*. This is my procedure. You know what, I don't remember if she did this. It happened a long time ago. *Those to me are honest answers*." (Emphases added.)

¶ 59 The court acknowledged that Sguros did not necessarily follow Bank procedure. It reasoned, however, that acts of negligence did not mean that Sguros was involved in the forgeries. Therefore, the court granted summary judgment to MB Financial, rejecting defendants' affirmative defense that Joyce's signatures on the letters of direction and the 2007 secondary CTAs were forged and that the Bank had reason to know such that it was not entitled to rely on the trustee's signature on the mortgage.

¶ 60 Defendants had tried to convince the court that the Bank's acts were more than negligent, without conceding that something more than negligence was required to trigger an exception to the general rule that the Bank was entitled to rely on the trustee's signature. (In defendants' view, the question was one of the Bank's awareness as opposed to its degree of wrongdoing). Defendants pointed to the circumstances surrounding the 2007 secondary letter of direction

where Sguros faxed a non-negotiable copy of the back-dated $50,000 check to Joyce but never obtained her endorsement on an actual copy of the check. This was indicative of the Bank's lax mode of operation and its willingness to take action and move funds without a required endorsement. The court agreed that these circumstances were especially troubling but disagreed as to their relevance, stating that they spoke only to the consideration issue.

¶ 61 The court next addressed the consideration issue. The court agreed with the Bank that consideration need not flow to Joyce or the trust. Rather, consideration can flow to a third party, here, the Roodings. However, in the court's view, the Bank failed to establish that consideration flowed to any party: "I think the issue is whether there was any consideration at all to anybody," and "that is the only issue that is preventing the court at this point from entering summary judgment [in full]." The court's concern stemmed from the Bank's treatment of the $50,000 check: "[Y]ou're asking me to assume that a bank [that] is not following proper procedure *** paid out on a check made out to three people when only two people endorsed it. And then they decide to send a fax copy to the third person to sign it. That's what you're asking me to assume." The court did not mention the 2006 $1,025,000 loan or the remainder of the 2007 $225,000 loan.

¶ 62 B. Trial on the Consideration Issue

¶ 63 On September 12, 2016, the parties proceeded to trial on the consideration issue. MB Financial moved *in limine* to bar defendants from presenting any testimony relating to any issue other than consideration, including any testimony related to the alleged forgery of documents. MB Financial argued that the forgery issue had been decided at the July 15, 2015, summary judgment hearing, and only the following issues remained: "Was there consideration for these loans? Was Ms. Sween [as opposed to the Roodings] supposed to get the consideration?" The

court agreed, "I think those are the issues," and it stated, "*the whole forgery thing has been put aside* now because I've ruled—I've made certain rulings." (Emphasis added.) Defendants responded that this would unfairly limit their defense. Its assertion that a forgery occurred was "inextricably tied" to its argument that, per *Verson v. Steinberg*, 191 Ill. App. 3d 851 (1989), Joyce was a "stranger" to the transaction and, hence, there was no consideration. The court back-tracked:

> "You know what? I'm going to reserve ruling at this point. Let's see what they're going to—*we're not going to go astray on this whole whether she signed it or not, or it was forged or not*.
>
> But, let me see how it plays in the course of the testimony and I'll make a ruling, and you can object at that time, and I'll make a ruling as to that." (Emphasis added.)

¶ 64 The Bank first presented its case. Its theory was that both the 2006 and 2007 mortgages were supported by consideration. Consideration for the 2006 mortgage was shown by the 2006 note signed by the Roodings and by the fact that the Roodings signed a final statement from a title company showing that they used the proceeds to purchase the Antioch property. In short, the 2006 mortgage was supported by consideration in the form of loan proceeds received by the Roodings. Consideration for the 2007 mortgage was shown by the 2007 note signed by the Roodings (and, later, allegedly, Joyce and Chicago Title) and by the fact that the Roodings drew upon the line of credit.

¶ 65 Two witnesses testified, Dustin Ackman and Joyce. The Bank first called Ackman. Ackman worked for MB Financial. He did not work for Broadway Bank and, therefore, was not an agent of the Bank nor was he present when any of the relevant documents were signed. However, he would testify to general practices. Ackman managed a group called acquired

assets, which handled all loans, such as those at issue, acquired during the FDIC-assisted transition. Ackman has supervisory responsibility over the two loans at issue.

¶ 66 The 2006 promissory note showed that the borrowers were the Roodings. The corresponding disbursement request and authorization stated that the $1,025,000 in loan proceeds were to go to Chicago Title. Then, the proceeds were to be used to purchase the Antioch property. The remaining $100,000-plus dollars were to go back to Broadway Bank, where they would be held in the Roodings' business account. The interest generated would be used to pay some of the fees outstanding on the loans.

¶ 67 The 2007 promissory note was evidence of the $150,000, 2007 loan. The note named the Roodings as borrowers. The note explained that the purpose of the loan was to create a line of credit for the Roodings.

¶ 68 The last modification of the 2007 loan showed an increase in the loan amount from $175,000 to $225,000. The modification was based on a letter of direction. The letter of direction for that modification was dated May 15, 2008. The next day, $50,000, issued via check, went into the Roodings' business account.

¶ 69 Finally, Ackman recounted that Joyce herself made one payment on each loan via check. These checks, dated June 25, 2009, were admitted into evidence. The first check amount was for $34,042 in partial satisfaction of the 2006 loan. The second check amount was for $10,228 in partial satisfaction of the 2007 loan. On each check, she wrote the appropriate loan number.

¶ 70 During cross-examination, Ackman acknowledged that neither Chicago Title nor Joyce had ever signed a loan guaranty for the 2006 loan. When asked if he had ever seen a $1 million-plus loan where the person who put up the collateral was not a party to the loan, Ackman answered: "I've seen a lot of different things, so yes." Ackman also acknowledged that the

letters of direction instructed that Joyce was to receive the loan proceeds. However, nothing in the actual mortgage or note indicated that Joyce was to receive consideration directly.

¶ 71 The Bank then called Joyce as an adverse witness. Joyce testified that she did not expect any of the loan proceeds to flow to her, because she did not know anything about the loan. The transcripts show at least five exchanges along the following lines:

> "Q. You didn't borrow $1,025,000 from Broadway Bank in 2006, did you?
>
> A. No.
>
> Q.You weren't expecting to receive any proceeds from a loan in 2006 from Broadway Bank, were you?
>
> A. I didn't know anything about it. No."

And,

> "Q. You weren't expecting to receive $150,000 in proceeds from Broadway Bank in 2007, were you?
>
> A. No. I knew nothing about this."

(In the Bank's view, this testimony is relevant because, if there was no forgery, and Joyce knowingly directed the trustee to enter into the mortgage, then Joyce agreed that she was not to receive the consideration personally and, despite the inconsistent instruction on the letter of direction, there was no problem with the Roodings receiving the consideration.)

¶ 72 Joyce agreed that she made one payment on each loan via check, for $34,000 and $10,000 respectively. However, she believed that she was making payments on her daughter's loan. She also agreed that she signed a faxed, non-negotiable copy of the back-dated $50,000 check upon Sguros' request.

¶ 73 Defendants moved for a directed finding. The Bank responded that, given the burdens of proof when trying an affirmative defense, a directed finding would not be appropriate. The Bank presented its case that consideration flowed to a third party, the Roodings. This pattern of hypothecation, where one person pledges a mortgage to secure the debt of another, is perfectly proper. The court must wait to hear the defendants' case before it decides whether this standard consideration was not proper here. The court ultimately agreed, and it declined to grant the motion. Before hearing defendants' case, it spoke to the merits:

> "Well, if you want me to look at what I have before me, the signature[s] that she has authenticated [on the $50,000 check and loan payments for $34,000 and $10,000] compared to the other signatures [on the letters of direction], I don't see much difference.
>
> And unless there's an expert that's going to come in here, if I were to look at those two signatures, I would say it's her signature.
>
> So if you want to continue on that forgery argument, based on what is before me, that is what is before me.
>
> I mean, she has authenticated the signature that's on the [$50,000] check. And, if you look at that signature compared to the other ones, you know, as a lay person, I cannot say that they are not the same person signing it."

¶ 74 Defendants then presented their defense. Joyce again testified that she did not sign the letters of direction. She stated that she was unaware of the 2006 and 2007 mortgages. She thought that her original mortgage was the only encumbrance on the property, and she paid that in full in 2010.

¶ 75 The court ruled in favor of the Bank. In its written order, the court noted that the burden of proof regarding the lack of consideration for a mortgage is upon the party asserting it. *Codo v.*

Union National Bank & Trust Co. of Joliet, 54 Ill. App 3d 810, 812 (1977). It also recited that the construction of a mortgage involves examination of all instruments executed by the contracting parties in the course of the transaction and such construction must take place in the context of the overall transaction. *Peterson Bank v. Langendorf*, 136 Ill. App. 3d 537, 540 (1985). And, it observed that it is perfectly legitimate for consideration for a mortgage to flow to a third party. *Id*.

¶ 76 The court found that here, upon examination of all of the documents in the course of the transaction, it was clear that proper consideration flowed to the Roodings, as intended. Addressing the letter of direction, the court acknowledged that the letter instructed that the loan proceeds should be paid to Joyce, individually. And, on that direction, a pay-proceeds letter issued instructing payment to Joyce. However, the letter of direction also named the Roodings as borrowers (and borrowers receive the loan proceeds). Moreover, the letter of direction attached certain documents, such as the yet-to-be-signed promissory note and mortgage, which "clearly inform[ed]" the parties that the loans were to be used for the purchase of the Antioch property and that any disbursements under the line of credit were to be made to the Roodings. Addressing the first and second mortgages signed by Chicago Title, the court stated that it was clear that the Roodings were the borrowers, the mortgages provided security for the loans made to the Roodings, and the proceeds from the 2006 loan were to be used to purchase the Antioch property. Thus, the mortgage could not be invalidated because the consideration, the loan proceeds, did not flow to Joyce individually.

¶ 77 The court rejected defendants' argument that there was no consideration, because Joyce was a stranger to the transaction. The court found the facts before it to be distinguishable from those in *Verson*, upon which defendants had relied. In *Verson*, the trust grantor's estranged wife

received no consideration for cosigning a deed of trust and, accordingly, was not liable for the underlying debt. *Verson*, 191 Ill. App. 3d 855. The wife was a mere "stranger" to the transaction, where she had cosigned the deed only at the husband's urging that her signature was a mere formality and where the deed was executed for the sole purpose of securing the husband's personal debt. *Id*. *Verson* was not a land trust case and it did not involve a forgery.

¶ 78 Here, the court stated: "[Defendants'] contention that *Verson* is dispositive hinges on [their] assertion that the Riverwoods property mortgages were procured by fraud." The court rejected the premise that a fraud had occurred:

> "Joyce Sween testified at trial that she knew nothing about the mortgages or CTAs and [she] claim[ed] she did not sign any of the documents. However, her testimony is *not credible* as she also testified that the signatures did look like her signature and she wrote several checks to Broadway Bank to make payments on the loans on behalf of Terri Sween and Ronald Rooding. When the entire transaction is examined, it is clear that the first and second mortgages were executed on the Riverwoods property at the direction of Joyce Sween as collateral for the 2006 and 2007 loans. Thus, there is no evidence of fraud or that Joyce Sween and Chicago Title were strangers to the transactions." (Emphasis added.)

As the court rejected the premise that a fraud had occurred, it rejected the argument that Joyce was a stranger to the transaction, and, thus, the mortgage should be invalidated for a lack of consideration.

¶ 79 On February 1, 2017, the court entered a judgment of sale and foreclosure for counts I and II. As to count I, the court found that $582,522 remained due under the 2006 loan and the Roodings only were personally liable for any deficiency upon sale. As to count II, the court

found that $244,969 remained due under the 2007 loan and the Roodings *and Joyce* were personally liable for any deficiency upon sale. In a separate order that same day, the court again stated that judgments of sale and foreclosure were entered on counts I and II, and then, in a single sentence, added that judgment on *count VI* was entered against Joyce, in the amount of $244,969. Then, on May 12, 2017, the court entered notice of the sheriff's sale. The Bank prepared the notice. The notice set forth a total judgment amount of $827,492, based on counts I and II only, not count VI.

¶ 80 On June 20, 2017, the sheriff conducted a sale of the Riverwoods property. The Bank was the highest and best bidder, purchasing the property for $400,000. The sheriff's report of sale noted that the total amount due to the Bank under the February 1, 2017, judgments had been $827,492 ($582,522 + $244,969). Subsequent costs and interest brought the total to $857,471. This left a deficiency of $457,471 ($857,471 - $400,000).

¶ 81 On July 19, 2017, the trial court entered an order approving the sheriff's report of sale. It wrote: "[T]here shall be an in personam deficiency judgment *** in the sum of $457,471 against [the Roodings *and Joyce*]." This appeal followed.

¶ 82 II. ANALYSIS

¶ 83 Defendants appeal the trial court's earlier rulings that upheld the validity of the mortgages: (1) its partial grant of summary judgment to the Bank, having found no genuine issue of material fact that the Bank had reason to know of Joyce's forged signature on her letter of direction to Chicago Title to enter into the mortgages; and (2) its determination following a trial that the mortgages were supported by valid consideration. The first issue presents questions of liability and remedy when a trustee acts on a forged letter of direction. The second issue, consideration, is relatively straightforward as framed on appeal, but the trial court's rejection of

the consideration issue as framed below arguably rendered moot the summary-judgment issue. We address these issues, as well as the deficiency judgment, in turn.

¶ 84 A. Summary Judgment

¶ 85 We first address the trial court's partial grant of summary judgment. "Summary judgment is proper where, when viewed in the light most favorable to the non-moving party, the pleadings, deposition, admissions, and affidavits on file reveal that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Northern Illinois Emergency Physicians v. Landau, Omahana & Kopka, Ltd.*, 216 Ill. 2d 294, 305 (2005). At the summary judgment stage, a trial court cannot make credibility determinations or weigh the evidence. *Gulino v. Economy Fire & Casualty Co.*, 2012 IL App (1st) 102428, ¶ 25. The purpose of a motion for summary judgment is to determine if a triable question of fact exists, not to resolve it. *AVH Holdings, Inc. v. Avreco, Inc.*, 357 Ill. App. 3d 17, 31 (2005). If the court determines that a genuine issue of material fact remains, it must reverse the grant of summary judgment. *Jewish Hospital of St. Louis, Missouri v. Boatman's National Bank of Belleville*, 261 Ill. App. 3d 750, 755 (1994). We review a grant of summary judgment *de novo*. *Sollami v. Eaton*, 201 Ill. 2d 1, 7 (2002).

¶ 86 We review black-letter law concerning mortgages and land trusts. To establish a *prima facie* case for mortgage foreclosure, a plaintiff must prove only that it is the holder of the note and mortgage, that those documents were properly executed, and that a default occurred. *Rago v. Cosmopolitan National Bank*, 89 Ill. App. 2d 12, 19 (1967). Then, the burden shifts to the defendant to prove an affirmative defense. *Id*.

¶ 87 Here, defendants concede that the Bank established a *prima facie* case for foreclosure. Rather, they focus on their affirmative defense that the mortgage should be invalidated, because

the trustee acted on a forged letter of direction and the Bank had notice of said infirmity. This affirmative defense requires knowledge of land trusts in general, trustee and beneficiary roles in a land trust, a land trustee's fiduciary duties, a land trustee's warranties and third-party reliance on the same, as well as liability and remedy when a trustee acts on a forged letter of direction purportedly from the beneficiary.

¶ 88 The Illinois land trust is a unique creation of the Illinois bar, rooted in case law rather than statute. *People v. Chicago Title and Trust Co.*, 75 Ill. 2d 479, 487 (1979). The land trust may serve as a useful vehicle in real estate transactions to allow ease of transfer and preserve secrecy of ownership. *Id*. In a land trust, the legal and equitable title lies with the trustee. *Id*. at 488. Title, however, is the only attribute of ownership ascribed to the trustee. *Id*. Title refers to a legal relationship to the property, whereas the remaining attributes of ownership pertain to the right to control the property and receive its benefits. *Id*. at 489. Aside from title, it is the beneficiary who retains the remaining attributes of ownership. *Id*.

¶ 89 Thus, a land trust is different than a conventional trust in that, while the trustee holds the legal title to the property, the beneficiary retains full management powers. *Progressive Land Developers, Inc. v. Exchange National Bank of Chicago*, 266 Ill. App. 3d 934, 940 (1994). Because the beneficiary retains full management powers, the trustee to a land trust does not owe the beneficiaries all of the fiduciary duties owed by a trustee of a conventional trust. *Id*. at 941. Nevertheless, the land trustee has certain fiduciary obligations. *Id*. For example, when a land trustee knows or should know that the person exercising the power of direction is doing so illicitly, the trustee should refuse to act on the direction. *Id*. If the trustee willfully or negligently acts on an improper direction, it will be liable for any loss to the trust resulting from

the breach and must place the beneficiaries in the position they would have been in had the breach of fiduciary duty not occurred. *Id*. at 942.

¶ 90 Again, the trustee exercises no control over the property and only acts according to the beneficiaries' directions. *Gross*, 324 Ill. App. 3d at 875. The trustee is not required to inquire into the propriety of any direction from the beneficiary. *Id*. "Accordingly, the single warranty or representation that a trustee makes upon execution of documents is that it has the power and authority to appropriately execute the instruments." *Id*. at 875-76. Generally, a third party, even the State, may rely on the trustee's representation that it has the power and authority to execute an instrument where title to the real estate is of primary importance. *Chicago Title*, 75 Ill. 2d at 488.

¶ 91 The case law addressing liability and remedy when a trustee acts on a forged letter of direction is still developing. However, the cases cited by the parties, particularly *Chrystyan*, *Grot*, *Progressive*, and *Gross*, show that the individual circumstances of each case dictate the liability and remedy. And, where factual circumstances guide the court into one analysis over another, the case is all the more appropriate for trial.

¶ 92 In *Chrystyan*, which did not involve a third party outside the land trust, the question was not so much liability as remedy. There, the trustee acted on a forged letter of direction purportedly signed by one joint tenant/beneficiary to convey property to the second joint tenant/beneficiary, and sever the joint tenancy. The court did not think it necessary to consider who forged the signature, but the only evidence presented on the matter suggested that it was, in fact, the second joint tenant. The court declared *void* the letter of direction and the subsequent deed. *Chrystyan*, 156 Ill. App. 3d at 785. It reinstated the joint tenancy. *Id*.

¶ 93 In *Grot*, the trustee relied on *Chyrstyan* to argue that, even if it did breach its fiduciary duty by acting on a forged letter of direction, there could be no damages when the letter of direction and the subsequent note and mortgage were void. The court rejected the trustee's argument, stating that *Chyrstyan* should be considered on its narrow facts:

> "[*Chrystyan*] deals with the original parties, or those taking under them, rather than a *bona fide* purchaser for value without notice of any infirmities. We are reluctant to use the term 'void' where the rights of an innocent third party have intervened. This is particularly the case when we consider that the actual documents (the note and mortgage) are not forgeries and there is no way for the grantee or mortgagee to determine the forgery of documents between the trustee and its beneficiaries. While we need not address the issue directly, as between a *bona fide* purchaser without notice and one who has established a trust that dispenses with the necessity of his signature being acknowledged and spread of record, the equities would seem to be with the *bona fide* purchaser." *Id*. at 92-93.

¶ 94 While the *Grot* court took care to distinguish its facts from those in *Chrystyan*, its commentary is, nevertheless, *dicta*. The court ultimately affirmed on other grounds. Regardless, we agree with the *Grot* court's rationale and believe it fills a gap in the case law. The *Grot* rationale is consistent with the general principle that a third party may rely on the trustee's representation that it has the power and authority to execute an instrument where title to the real estate is of primary importance. *Chicago Title*, 75 Ill. 2d at 488. Its rationale is also consistent with the general principle that, in the case of a forged letter of direction, the beneficiary's recourse is to pursue an action against the trustee rather than an innocent third party. *Gross*, 324 Ill. App. 3d at 374; *Progressive*, 266 Ill. App. 3d at 940. Indeed, as stated in *Grot*, the grantor

chose to dispense with the necessity of the beneficiary's direct involvement and signature on the actual mortgage by establishing a trust, selecting a trustee, and vesting that trustee with the authority to enter into transactions involving title on the beneficiary's behalf.

¶ 95 Thus, generally, when a trustee transacts with a third party, the third party may rely on the trustee's warranty that it is authorized to enter into the transaction. The third party need not investigate or question whether the trustee is acting upon a legitimate letter of direction. However, if the third party has notice of any infirmities in the letter of direction and the trustee's authority to act, it enters into the transaction at its own peril. The question is what circumstances are sufficient to establish the third party's awareness of an infirmity and, as a result, its liability.

¶ 96 In *Gross*, the court stated in *dicta* that a bank's mere delivery of the letter of direction to the trustee did not establish that the bank somehow endorsed the authenticity of the beneficiary's signature on the letter of direction. *Gross*, 324 Ill. App. 3d at 874-75. The *Gross* court noted the strength of the trustee's warranty, and it implied that more compelling circumstances were required before the damages caused by the forgery would be borne by the third party. *Id*. Still, we do not read *Gross* to require that the Bank be a full-on participant in the forgery to bear some cost related to the fraud.

¶ 97 This position is consistent with the general principle stated in *M&T Bank v. Mallinckrodt*, 2015 IL App (2d) 141233, ¶ 52, that, "where two innocent parties must suffer by reason of the fraud or wrong conduct of another, the burden must fall upon him who put it in the power of the wrongdoer to commit the fraud or do the wrong." In *Mallinckrodt*, a question of fact remained as to whether a second mortgage lender could have reasonably relied on the fraudulent statement that the first mortgage had been paid. *Id*. *Mallinckrodt* did not involve a land trust, but, just the

same, it shows that a mortgage lender may bear some costs associated with a fraudulently procured mortgage if it had reason to know that a fraud was being perpetrated.

¶ 98 Here, at the hearing on the motion, the Bank conceded that its involvement need not amount to actual participation in the forgery to lose its status as an innocent party entitled to rely upon the trustee's warranty. There, the Bank stated: "[I]f Broadway Bank was involved in the forgeries, then obviously we had reason to know the land trustee's signature was not [the result of a legitimate letter of direction]. So it would take us out of the line of cases that we could rely on the land trustee's signature [when entering into a mortgage or other transaction involving the title of the property]. But we weren't involved." The Bank acknowledged that proving that it was "involved in" the forgery was a higher standard than proving it had "reason to know" of the forgery.

¶ 99 Despite the Bank's concession that the court should evaluate its culpability in terms of reason to know, the court appeared to apply a much higher standard. It repeatedly stated that, because Sguros flatly denied forging Joyce's signature on the letter of direction *herself*, the Bank was entitled to rely on the trustee's warranty that it was authorized to enter into the mortgage.

¶ 100 Also, the court improperly made credibility determinations at the summary judgment stage when it accepted Sguros' deposition testimony as true. The court stated:

> "Ms. Sguros testimony is that she doesn't recall and then at points may be vague ***. I think that as I read the deposition transcript and then some of the comments you made as far as characterizing her testimony, I think that in fact while she may have changed her testimony a couple of times, it's people catching themselves saying, you know what, this is really what happened. Now I remember. Or being frankly *honest* about what went on." (Emphasis added.)

And,

> "You know the other issues that you raise are frankly *I would interpret as her being honest*. This is my procedure. You know what, I don't remember if she did this. It happened a long time ago. *Those to me are honest answers*." (Emphases added.)

The court is not to make credibility determinations at the summary judgment stage. To find Sguros was being truthful was to find that Joyce was being untruthful. Sguros and Joyce presented two, diametrically opposed factual scenarios. Sguros' testimony directly conflicted with Joyce's on many key points, such as whether Joyce signed the letters of direction in the presence of a loan officer, or at all, and whether Joyce went into the Bank on 10 different occasions.

¶ 101 Sguros' deposition testimony, with its gaps and inconsistencies, leave a triable question of material fact as to whether the Bank was entitled to rely on the trustee's signature. To demonstrate this point, we first examine evidence that a forgery occurred, and we then examine evidence that the Bank had notice of the forgery such that it was not entitled to rely on the trustee's signature. We look to both Joyce's and Sguros' deposition testimony.

¶ 102 For the purposes of summary judgment, the court and the Bank accepted that Joyce's signatures on the letters of direction were forged. There was evidence to support forgery. Joyce testified in deposition that she did not sign any of the letters of direction at issue in this case. She stated: "I know I never signed this. I know that," "No, absolutely not," and "I never authorized the trust company to sign anything [pertaining to the 2006 and 2007] mortgages." Joyce also testified that she only went into the bank three times, enough times to address her original mortgage but not enough to sign the letters of direction at issue here. Joyce insisted that she knew nothing about the 2006 and 2007 mortgages until she received the complaint for

foreclosure. She stated: "This has been a shock for me." Indeed, circumstantial evidence supports that Joyce was unaware of the 2006 and 2007 mortgages. That is, in 2010, when she learned that Broadway Bank was in receivership, she paid $100,000 to satisfy her original mortgage in total.

¶ 103 Granted, other evidence weighs against a forgery and Joyce's alleged ignorance of the 2006 and 2007 mortgages. Joyce made two payments on the loans, for $10,000 and $34,000 respectively. (She explained that her daughter asked for help. She thought she was making a payment on her daughter's loan and did not realize her own property was encumbered.) Also, Joyce paid the trustee's fees for acting on each letter of direction. (She explained that she knew she had a relationship with the trustee, so she paid the company for what she presumed to be legitimate work, still unaware that a new encumbrance had been placed on the Riverwoods property.) These discrepancies do not defeat Joyce's argument but, rather, create a triable issue of fact that turn on credibility determinations.

¶ 104 Regardless, for the purposes of summary judgment, the parties accepted that Joyce's signature on the letter of direction was forged, leaving only the remaining question of whether the Bank was entitled to rely on the trustee's signature on the mortgage. In our view, there was evidence to support defendants' position that the Bank was not entitled to rely on the trustee's signature and that summary judgment should not have been granted. Specifically: (1) Sguros' testimony created a logical inference that, if the letter of direction was forged, Sguros should have been on notice that it was forged; (2) the circumstances surrounding the 2007 secondary letter of direction to add Joyce as a borrower support that Joyce was not, in fact, present in the bank when the letter of direction was signed and that Sguros participated in the unorthodox conduct; and (3) Sguros' testimony is inconsistent on the key question of forgery.

¶ 105 First, accepting that the signature was forged was, in effect, to agree that a genuine issue of material fact exists as to whether the Bank had reason to know it was forged. This is because, in Sguros' deposition testimony, she acknowledged that letters of direction requiring the signature of a non-borrower beneficiary, such as Joyce, are ripe for forgery. For that reason, Sguros would "never" give loan documents, such as a letter of direction, to a borrower to take home and obtain the required non-borrower beneficiary's signature outside the presence of a bank officer. "[W]e would have no proof that the persons signed the documents or not. That's not our procedure, and especially [not] my procedure." If the signature was forged, as the Bank admits for the purposes of summary judgment, then Sguros cannot have witnessed Joyce sign the document. Yet, knowing that letters of direction instructing loans to third parties were ripe for forgery, she would have chosen to "consent to" the direction without the safeguard of witnessing Joyce sign the document in her presence. Moreover, by consenting to the direction, she would have implied that she had witnessed Joyce sign the document, and that affirmative conduct would make it more likely that Chicago Title would trust the authenticity of the signature and enter into a contract with the Bank for the mortgage. As she testified, in practice, the trustee was unlikely to act on the letter of direction without the loan officer's signed consent (even though it was legally unnecessary). These circumstances, if true, are far more egregious than those in *Gross*, where the mortgage lender merely mailed the letter of direction to the trustee. The Bank's "consent to" procedure seems to have caused greater problems than if it had chosen to employ a notary.

¶ 106 The circumstances surrounding the 2007 secondary letter of direction to add Joyce as a borrower and increase the loan amount by $50,000 support that the allegation that Joyce was not present at the signing. Again, that letter of direction was dated May 15, 2008. That same day,

Sguros faxed a non-negotiable copy of a back-dated $50,000 check, which Joyce signed and returned. The record contains the copies of the faxes, dated May 15, 2008. That Sguros faxed a copy of the check from the bank to a different location where Joyce received it, signed it, and returned it is a very strong indication that Joyce was not present at the Bank on the date the Bank alleges the 2007 secondary letter of direction to have been signed. Sguros initiated this unusual exchange, asking Joyce to sign a copy of a check dated two years prior. The trial court was troubled by this incident, but it incorrectly concluded that the incident spoke only to the issue of consideration. To the contrary, the incident again arguably demonstrates Sguros' awareness that Joyce did not sign the letter of direction in the presence of a loan officer and was not even present in the bank that day, making it more likely that the signature was forged. The incident also demonstrates that Sguros was willing to process a $50,000 check without a required endorsement, which speaks to her overall credibility and disregard for bank procedures.

¶ 107 Finally, Sguros' testimony is inconsistent on the key question of forgery. She was "positive" that she witnessed Joyce sign the letters of direction. She stated: "I would say with all the transactions, I have dealt with Joyce Sween maybe nine or ten times," and "I do have a specific recollection [of these signings]. I just don't know what date." She was "99.9% certain" that the Roodings could not have forged the documents outside the bank, because: "We *never* give the documents for them to sign because we have no proof that that person signed the documents or not. That's not our procedure, and especially my procedure." (Emphasis added.) Later, she was unwilling to say whether she ever provided the Roodings with letters of direction for Joyce to sign. Such a significant deviation from her former position of 99.9% certainty and absolute procedure ("we *never* give documents for them to sign") is troubling. We do not agree with the trial court, which relied on a cold transcript alone, that a shift of this nature can be

explained away as an "honest" memory lapse. Indeed, the 2007 secondary letter of direction adding Joyce as a borrower was one of the only letters that did not bear a "consented to" signature by a bank official, once again indicating that the letter was not signed in the presence of a loan officer. Sguros' testimony was also inconsistent with Joyce's as to the number of times that Joyce went into the Bank to sign documents, 10 as compared to 3. These are critical discrepancies that should have been resolved at trial.

¶ 108 In sum, a question of fact exists as to whether the Bank was entitled to rely on the trustee's signature on the mortgage or whether its awareness of a potential forgery on the letters of direction precluded its reliance. In the context of Broadway Bank's takeover by the FDIC, and, ultimately, purchase by MB Financial, the 2006 and 2007 mortgages fell into default. Joyce testified that she did not sign any letter of direction authorizing the trustee to enter into or modify the 2006 and 2007 mortgages and notes. Circumstantial evidence arguably supports her assertion. She paid off what she believed to be her remaining encumbrance in full. Also, Sguros sent Joyce a fax, which Joyce signed, on the same day Joyce purportedly signed a critical letter of direction at the Bank. The court should not have granted summary judgment.

¶ 109 B. The Issues Presented at the Summary Judgment Stage Are not Moot

¶ 110 Next, we must consider whether the trial court's rejection of defendants' consideration defense rendered moot the summary judgment forgery issue. Below, defendants had argued that, per *Verson*, there was no consideration because Joyce was a stranger to the transaction. *Verson* did not involve a land trust or an alleged forgery, defendants have abandoned this argument on appeal, and, thus, they may not raise it again on remand. Nevertheless, part of this argument in the trial court was that Joyce was a stranger to the transaction, because she never authorized the mortgage, *i.e.*, her signature on the letter of direction had been forged. On the evidence

presented, the trial court found no forgery, and, thus, Joyce was not a stranger to the transaction. In fact, on the limited presentation of the evidence, it found Joyce not credible.

¶ 111 We determine that the issues before the court at the consideration hearing were different enough such that the summary judgment forgery issue is not rendered moot. Due to the Bank's motion *in limine*, defendants were limited in presenting their underlying forgery claim. Again, the court had stated at the beginning of the hearing: "The whole forgery thing has been put aside now because I've ruled—I've made certain rulings." However, the court back-tracked: "You know what? I'm going to reserve ruling at this point. Let's see what they're going to—we're not going to go astray on this whole whether she signed it or not, or it was forged or not." Therefore, while the court would admit limited evidence of forgery if it related to the stranger argument, it would not consider forgery and the Bank's awareness of the forgery as direct questions of fact. Sguros did not even testify. In our view, the questions raised by defendants' first argument were not answered at the hearing on the consideration issue.

¶ 112 Although the trial court made a negative credibility assessment against Joyce, defendants should have had the opportunity to measure any weaknesses in Joyce's testimony against those in Sguros'. The court's bases for finding Joyce not credible—its own conclusion that the signatures looked similar and its reliance on two payments on the loans made by Joyce—are not especially compelling. That a forgery, made outside the presence of a loan officer, might be a good forgery does not make it any less a forgery. Also, that an elderly woman might be willing to give her only child $44,000 (the amount of the two checks), is not inherently incredible.

¶ 113 Generally, we defer to a trial court's credibility determinations, because it is in a superior position to observe the witnesses and weigh the evidence. *Bazydlo v. Volant*, 164 Ill. 2d 207, 214 (1995). Our deference is lower when, as here, the trial court begins making credibility

determinations and weighing the evidence *before* observing the witnesses testify. Heading into the trial in this case, the court had already held, based on a cold record alone, that Sguros testified "honestly" to a factual scenario that was in direct conflict with Joyce's version of events. That premature finding tainted subsequent credibility determinations as to Joyce.

¶ 114 C. The Mortgages were Supported by Valid Consideration

¶ 115 Next, we lay to rest defendant's consideration argument. Defendants argue on appeal that there was no consideration for the mortgages because Joyce did not receive the loan proceeds. Defendants acknowledge that consideration for a mortgage need not flow directly to the mortgagor, but can flow to a third party. *Peterson*, 136 Ill. App. 3d at 539. Therefore, there is nothing inherently improper about the Roodings receiving the loan proceeds.

¶ 116 Nevertheless, defendants argue as follows. The letter of direction and the mortgage and note all pertain to the same transaction, so they are to be considered together and construed with reference to one another. And, when the documents are considered together, it is clear that the Bank induced the land trust to enter into the mortgage based on the promise that Joyce would receive the loan proceeds. The letter of direction, which was "consented to" by the Bank, instructed that Joyce receive the proceeds. Because she did not receive the proceeds, there was no consideration.

¶ 117 *Peterson* and *Tepfer*, upon which defendants rely, stand for the proposition that, "where two or more instruments are executed by the same contracting parties in the course of the same transaction, the instruments will be considered together and construed with reference to on another because they are, in the eyes of the law, one contract." (Emphasis added.) *Tepfer*, 118 Ill. App. 3d at 80; see also *Peterson*, 136 Ill. App. 3d at 540. In *Tepfer* and in *Peterson*, the instruments at issue were executed by the mortgagor and mortgagee in the course of the same

transaction. Therefore, they could be considered together. *Id*. Neither *Peterson* nor *Tepfer* involved a land trust or a letter of direction.

¶ 118 This case is unlike *Peterson* and *Tepfer*, because the instruments in question were not all executed by the same parties. The letter of direction constitutes an instruction from one party of the land trust to the other, *i.e.*, an instruction from the beneficiary to the trustee. See, *e.g.*, *Gross*, 324 Ill. App. 3d at 875. The Bank was not a party to the letter of direction. The mortgage and note, in contrast, constitute a contract between the land trust, as executed by the trustee, and the Bank as the lender. Because the contract between the land trust and the Bank clearly name the Roodings as the borrowers to whom the loan proceeds should flow, and because the Roodings did, indeed, receive the loan proceeds, the mortgage cannot be invalidated for lack of consideration.

¶ 119 We clarify that this case does not stand for the proposition that a court can never look to the letters of direction in order to interpret the mortgage and notes. Below, for example, defendants had cited a federal case, *Matter of Bailey*, 999 F. 2d 237, 241 (1993), where the court looked to the letter of direction to resolve a discrepancy between the mortgage and the note. Here, however, there was no discrepancy between the mortgage and the note. We reject defendants' consideration argument as framed on appeal.

¶ 120 D. Deficiency Judgment

¶ 121 Because we have vacated the trial court's grant of summary judgment such that the validity of the mortgages will now be decided at trial, we also vacate the deficiency judgment against Joyce. However, should the court ultimately uphold the validity of the mortgages, we address certain challenges to the deficiency judgment that may arise again. In the interest of

judicial economy, we may elect to address an issue likely to recur on remand. *Petre v. Kucich*, 331 Ill. App. 3d 935, 944 (2002).

¶ 122 Again, on February 1, 2017, the court entered a judgment of sale and foreclosure for counts I and II. As to count I, the court found that $582,522 remained due under the 2006 loan and the Roodings only were personally liable for any deficiency upon sale. As to count II, the court found that $244,969 remained due under the 2007 loan and the Roodings *and Joyce* were personally liable for any deficiency upon sale. In a separate order that same day, the court again stated that judgments of sale and foreclosure were entered on counts I and II, and then, in a single sentence, added that judgment on *count VI* was entered against Joyce, in the amount of $244,969. Then, on May 12, 2017, the court entered notice of the sheriff's sale. The Bank prepared the notice. The notice set forth a total judgment amount of $827,492, based on counts I and II only, not count VI.

¶ 123 On June 20, 2017, the sheriff conducted a sale of the Riverwoods property. The Bank was the highest and best bidder, purchasing the property for $400,000. The sheriff's report of sale noted that the total amount due to the Bank under the February 1, 2017, judgments had been $827,492 ($582,522 + $244,969). Subsequent costs and interest brought the total to $857,471. This left a deficiency of $457,471 ($857,471 - $400,000).

¶ 124 On July 19, 2017, the trial court entered an order approving the sheriff's report of sale. It wrote: "[T]here shall be an *in personam* deficiency judgment *** in the sum of $457,471 against [the Roodings and Joyce]."

¶ 125 We determine that the court erred when subtracted the $400,000 sale price from the $857,471 *total* judgment for counts I and II combined, to reach a deficiency total of $457,471 as to Joyce and the Roodings jointly. The Bank had never alleged that Joyce was personally liable

for any deficiency associated with the 2006 loan. And, the $582,522 judgment had been against the Roodings only. We are troubled that, on appeal, the Bank is willing to accept a large monetary error in its favor and at its former client's expense. The Bank seems to concede that the judgment amount was entered in error, but it argues that the amount should stand because Joyce did not file a motion to reconsider. However, the failure to file a posttrial motion to reconsider does not limit the scope of our review of a nonjury civil case. Ill. S. Ct. Rule 366(b)(3)(ii) (eff. Feb. 1, 1994).

¶ 126 Also, the Bank cannot seek a deficiency judgment for count VI. We acknowledge that, while the Bank informed the court that it would dismiss count VI, no such motion or order dismissing count VI is in the record. Still, the Bank chose to pursue judgment on counts I and II only, and count VI never went to trial. Had count VI gone to trial, there is no telling how Joyce might have presented her defense against that specific count. Count VI, which concerned Joyce's personal liability for the 2007 note, turned on those facts surrounding the 2007 secondary letter of direction that added her as a borrower. Again, those circumstances were highly unusual, and evidence indicated that Joyce was not present in the Bank that day. We are not able to review the trial court's determination of liability on count VI, where the trial court never heard evidence in relation to that specific count. As to count VI, absent a judgment on the pleadings, which the Bank did not pursue, or an evidentiary hearing, there is nothing to review and reversal is warranted. See, *e.g.*, *Gotham Lofts Condominium Association v. Kaider*, 2013 IL App (1st) 120400, ¶ 12 (absent an evidentiary hearing, there is nothing to review and reversal is warranted). The Bank's only real argument in defense of preserving count VI is, again, that Joyce did not file a motion to reconsider. Our response is, again, that the failure to file a posttrial motion to reconsider does not limit the scope of our review of a nonjury civil case. Ill. S. Ct.

Rule 366(b)(3)(ii). The Bank has abandoned count VI, and, on remand, the court is to address only counts I and II and the defendants' remaining affirmative defense that the mortgages are invalid, because the Bank was not entitled to rely on the trustee's signature on the mortgage.

¶ 127 We note that the Bank also informed the trial court, in its summary-judgment pleadings, that it would not seek a deficiency judgment against Joyce for count II. The parties did not brief whether the Bank's failure to prove count VI, Joyce's alleged breach of the 2007 note, as opposed to the Roodings' breach of the 2007 note, affects the Bank's ability to seek a deficiency judgment against Joyce in relation to count II, where it sought to foreclose on the 2007 mortgage and sell the Riverwoods property. Therefore, we do not address that issue.

¶ 128 III. CONCLUSION

¶ 129 For the reasons stated above, we vacate the trial court's grant of summary judgment and the deficiency judgment. On remand, if the court determines after a trial that the bank was entitled to rely on the trustee's signature, there is no need to revisit the consideration issue.

¶ 130 Vacated and remanded.