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U.S. Bank National Association, appellant, v. Steven E. Peterson and Catherine M. Peterson, appellees.

U.S. Bank National Association, appellant, v. Jason D. Lunders, appellee.

U.S. Bank National Association, appellant, v. David L. Skoglund, appellee.

U.S. Bank National Association, appellant, v. Mark A. Huls, appellee.

823 N.W.2d 460

Filed December 7, 2012. Nos. S-12-086 through S-12-089.

1. **Summary Judgment: Appeal and Error.** An appellate court will affirm a lower court's grant of summary judgment if the pleadings and admissible evidence offered at the hearing show that there is no genuine issue as to any material facts or the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
2. ____: ____. In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment was granted and gives that party the benefit of all reasonable inferences deducible from the evidence.
3. **Pretrial Procedure: Appeal and Error.** Decisions regarding discovery are directed to the discretion of the trial court, and will be upheld in the absence of an abuse of discretion.
4. **Judges: Words and Phrases.** A judicial abuse of discretion exists when reasons or rulings of a trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying just results in matters submitted for disposition.
5. **Pretrial Procedure: Proof: Appeal and Error.** The party asserting error in a discovery ruling bears the burden of showing that the ruling was an abuse of discretion.
6. **Rules of the Supreme Court: Pretrial Procedure.** The language of Neb. Ct. R. Disc. § 6-336 contemplates that a request for admission can ask a party to admit facts in dispute, the ultimate facts in a case, or facts as they relate to the law applicable to the case.
7. **Rules of the Supreme Court: Pretrial Procedure: Evidence: Proof.** Neb. Ct. R. Disc. § 6-336 is self-enforcing, without the necessity of judicial action to effect an admission which results from a party's failure to answer or object to a request for admission. However, § 6-336 is not self-executing. Thus, a party that seeks to claim another party's admission, as a result of that party's failure to respond properly to a request for admission, must prove service of the request for admission and the served party's failure to answer or object to the request and must also offer the request for admission as evidence. If the necessary foundational requirements are met and no motion is sustained to withdraw an admission, a trial court is obligated to give effect to the provisions of § 6-336 which require that the matter be deemed admitted.

8. **Pretrial Procedure: Evidence.** An admission which is not withdrawn or amended cannot be rebutted by contrary evidence or ignored by the district court simply because the court finds the evidence presented by the party against whom the admission operates to be more credible.
9. **Summary Judgment: Final Orders: Appeal and Error.** Although the denial of a motion for summary judgment, standing alone, is not a final, appealable order, when adverse parties have each moved for summary judgment and the trial court has sustained one of the motions, the reviewing court obtains jurisdiction over both motions and may determine the controversy which is the subject of those motions or make an order specifying the facts which appear without substantial controversy and direct such further proceedings as it deems just.

Appeals from the District Court for Madison County: JAMES G. KUBE, Judge. Reversed and remanded for further proceedings.

Stephen H. Nelsen and Shawn D. Renner, of Cline, Williams, Wright, Johnson & Oldfather, L.L.P., for appellant.

D.C. Bradford and Justin D. Eichmann, of Bradford & Coenen, L.L.C., for appellees.

HEAVICAN, C.J., CONNOLLY, STEPHAN, MCCORMACK, MILLER-LERMAN, and CASSEL, JJ.

MILLER-LERMAN, J.

NATURE OF CASE

In these consolidated appeals, U.S. Bank National Association (the Bank) sued five guarantors following defaults on the underlying notes. During the course of the proceedings, the Bank tendered requests for admissions to each of the guarantors regarding various facts, including a request to admit the specific amount due on the note for principal, accrued interest, and a prepayment fee that the Bank claimed was due under each of the notes. By virtue of various rulings, the district court for Madison County entered judgment in favor of the Bank with respect to the principal and accrued interest due from the guarantors but, based in part on the guarantors' answers to the requests for admissions, determined that the Bank was not entitled to prepayment fees.

On appeal, the Bank claims that the court erred when it treated the guarantors' answers to the Bank's requests for

admissions as denials rather than admissions that the guarantors owed prepayment fees. We find merit to the Bank's argument and conclude that the court erred when it treated the answers as denials and granted summary judgment in favor of the guarantor in each case on the prepayment fee issue. We reverse the rulings regarding the prepayment fee issue and remand the causes to the district court for further proceedings.

STATEMENT OF FACTS

In four separate actions, the Bank filed complaints in the district court for Madison County against, respectively, Steven E. Peterson and Catherine M. Peterson, Jason D. Lunders, David L. Skoglund, and Mark A. Huls. Each suit claimed that these individuals served as guarantors on various notes and that the notes were in default. Each of the defendants executed a guaranty for a portion of the obligations of certain limited liability companies to the Bank. The Petersons guaranteed 50 percent of the obligations of Magnum 43, LLC, which had two notes with the Bank, and 12.5 percent of the obligations of Remington, LLC, which had one note with the Bank. Lunders guaranteed 12.5 percent of the obligations of Remington, LLC. Skoglund guaranteed 50 percent of the obligations of Windmill Ridge, LLC, which had one note with the Bank, and Huls guaranteed 50 percent of the obligations of Rawhide, LLC, which had one note with the Bank. Each of the defendants was a member of the limited liability company (LLC) for which he or she guaranteed obligations. David and Nancy Meyer were members of all the LLC's and guaranteed a portion of each LLC's obligations. Neither the LLC's nor the Meyers were named as defendants in these actions.

The facts that are relevant in this appeal are common to each defendant with respect to each obligation of each LLC. Therefore, for ease of reading, in the remainder of this opinion, we generically speak of "the guarantor," "the LLC" and "the note" as though such references are to only one defendant, one LLC, and one note; however, the references apply to each note of each LLC and the guaranty executed by each defendant. In quoted portions of the record, where we refer to a defendant or guarantor in the singular, it is to be noted

that in the Peterson case, the original refers in the plural to both Petersons.

In its complaint, the Bank alleged that the guarantor was in default on the guarantor's share of the balance due on the note. The Bank alleged specific amounts that were due for principal and accrued interest. The Bank also alleged a specific amount for a prepayment fee that it claimed was owed. The note executed by the LLC included the following provision with regard to a prepayment fee:

> There shall be no prepayments of this Note, provided that the Bank may consider requests for its consent with respect to prepayment of this Note, without incurring an obligation to do so, and the Borrower acknowledges that in the event that such consent is granted, the Borrower shall be required to pay the Bank, upon prepayment of all or part of the principal amount before final maturity, a prepayment indemnity ("Prepayment Fee") equal to the greater of zero, or that amount, calculated on any date of prepayment ("Prepayment Date"), which is derived by subtracting: (a) the principal amount of the Note or portion of the Note to be prepaid from (b) the Net Present Value of the Note or portion of the Note to be prepaid on such Prepayment Date; provided, however, that the Prepayment Fee shall not in any event exceed the maximum prepayment fee permitted by applicable law.

The Bank moved for summary judgment. At the summary judgment hearing, the Bank offered and the court received into evidence the guarantor's answers to the Bank's requests for admissions. One of the Bank's requests was for the guarantor to admit the specific amount due on the note for principal, accrued interest, and prepayment fee. The guarantor responded to such request as follows:

> Defendant does not have the information with which to admit or deny the numbers set out under Request for Admissions . . . including principal, interest, default and prepayment amounts. Defendant believes Plaintiff has continued to communicate those matters correctly with David and Nancy Meyer or their counsel and Defendant puts Plaintiff to its strict proof with respect thereto.

The guarantor offered and the court received into evidence an affidavit of the guarantor stating, inter alia, that the guarantor had guaranteed a portion of the LLC's obligations to the Bank, that the LLC had defaulted on the note, and that the Bank had declared the entire amount due on the note to be immediately due and payable. The guarantor quoted a portion of the note's provision regarding prepayment and stated that to the guarantor's knowledge, neither the LLC nor any of its members had requested prepayment of the note.

On March 7, 2011, the court sustained the Bank's motion for summary judgment in part but overruled the motion with respect to the prepayment fee. In the order, the court stated that the guarantor "acknowledged those amounts which [the Bank] claims are due and owing, but alleged as [the guarantor's] sole contention that the . . . prepayment fee, along with its continuing accrual, is inapplicable, and thus that [the Bank] is not entitled to this amount." The court concluded that the Bank was entitled to summary judgment with regard to the principal and accrued interest due from the guarantor but refused to rule as a matter of law that the Bank was entitled to the prepayment fee. The court therefore granted summary judgment to the extent of principal and accrued interest, but reserved the prepayment fee issue for trial. The guarantor has not appealed the substance of the ruling in which the district court found in favor of the Bank with respect to principal and interest, and, on appeal, we do not address nor disturb this ruling.

The guarantor thereafter moved for partial summary judgment with regard to the prepayment fee. At the hearing on the grantor's motion for summary judgment, the court received the evidence noted above that it had received at the hearing on the Bank's motion for summary judgment. After argument and briefing, the court, on January 5, 2012, entered an order in which it sustained the guarantor's motion for partial summary judgment.

In its order, the court rejected various arguments made by the Bank, including the Bank's argument that the guarantor's response to the request for admission regarding the balance due for principal, accrued interest, and prepayment fee was an

admission that a prepayment fee was due. The Bank noted the guarantor did not specifically deny the request and did not, as required by Neb. Ct. R. Disc. § 6-336 (Rule 36), set forth in detail the reasons why the guarantor could not truthfully admit or deny the matter or state that the guarantor had made reasonable inquiry and that the information known or readily obtainable by the guarantor was insufficient to enable the guarantor to admit or deny. The Bank argued that the guarantor's answer should have been treated as an admission.

The court disagreed with the Bank and treated the answer as a denial. The court stated the following in its order:

> Since the defendant did not specifically deny that the prepayment fee was required under the original note he is deemed to have admitted the same. However, as noted above, the defendant responded that he did not have sufficient information in order to admit or deny the specific amounts as set forth in the Admission. However, the defendant did put plaintiff on strict proof with respect to those amounts. *The Court interprets this as a denial of the specific amounts due and owing and accordingly, a denial that a prepayment fee is owed.*

(Emphasis supplied).

Turning to the terms of the note, the court determined that the prepayment clause in the note did not apply when the borrower defaults and the lender accelerates the note. The court reasoned that when the Bank accelerated the debt because of default, it effectively advanced the maturity date of the debt to the default date, and that therefore, any payment after that date was not a prepayment. The court concluded that the Bank was not entitled to a prepayment fee and that the guarantor was entitled to partial summary judgment.

The Bank appeals, inter alia, the order sustaining the guarantor's motion for partial summary judgment in which the court determined that the Bank was not entitled to a prepayment fee.

ASSIGNMENTS OF ERROR

The Bank claims that the district court erred when it (1) treated the guarantor's response to the Bank's request for

admission as a denial that a prepayment fee was owed and (2) concluded that the guarantor did not owe a prepayment fee, sustained the guarantor's motion for partial summary judgment, and overruled in part the Bank's motion for summary judgment. The guarantor did not cross-appeal the district court's ruling in favor of the Bank with respect to its entitlement to principal and interest, and we, therefore, do not consider such rulings.

STANDARDS OF REVIEW

[1,2] An appellate court will affirm a lower court's grant of summary judgment if the pleadings and admissible evidence offered at the hearing show that there is no genuine issue as to any material facts or the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law. *Olson v. Wrenshall, ante* p. 445, 822 N.W.2d 336 (2012). In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment was granted and gives that party the benefit of all reasonable inferences deducible from the evidence. *Id.*

[3-5] Decisions regarding discovery are directed to the discretion of the trial court, and will be upheld in the absence of an abuse of discretion. *Gonzalez v. Union Pacific RR. Co.*, 282 Neb. 47, 803 N.W.2d 424 (2011). A judicial abuse of discretion exists when reasons or rulings of a trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying just results in matters submitted for disposition. *Huber v. Rohrig*, 280 Neb. 868, 791 N.W.2d 590 (2010). The party asserting error in a discovery ruling bears the burden of showing that the ruling was an abuse of discretion. *Id.*

ANALYSIS

The District Court Abused Its Discretion When It Treated the Guarantor's Answer to the Bank's Request for Admission Regarding the Prepayment Fee as a Denial.

The Bank asserts that the district court erred when it treated the guarantor's answer to its request for admission with regard

to the prepayment fee as a denial that a prepayment fee was owed. We analyze the answer only as it pertains to the prepayment fee issue. We agree with the Bank that the district court erred. Under the discovery rule regarding requests for admissions, the court did not have the option to treat the answer as a denial and instead should have either ordered the guarantor to properly answer the request or treated the answer as an admission. We conclude that the court abused its discretion when it treated the response as a denial.

[6] Requests for admissions are governed by Rule 36, which generally provides that a party may serve upon another party a request for the admission of the truth of matters relevant to the case at hand, including "statements or opinions of fact or of the application of law to fact." We have stated that the language of Rule 36 contemplates that the request can ask a party to admit facts in dispute, the ultimate facts in a case, or facts as they relate to the law applicable to the case. See *Tymar v. Two Men and a Truck*, 282 Neb. 692, 805 N.W.2d 648 (2011). Therefore, the Bank's request for an admission that the guarantor owed a prepayment fee in a specific amount was a permissible request under Rule 36.

Rule 36 sets forth requirements for the form of both the request and the answer. Of particular relevance to the present case, Rule 36(a) provides as follows with respect to the appropriate response to a request for admission and what the court may do when a party fails to provide an appropriate response:

> The matter is admitted unless . . . the party to whom the request is directed serves upon the party requesting the admission a written answer or objection addressed to the matter, signed by the party or by his or her attorney . . . . If objection is made, the reasons therefor shall be stated. The answer shall specifically deny the matter or set forth in detail the reasons why the answering party cannot truthfully admit or deny the matter. A denial shall fairly meet the substance of the requested admission, and when good faith requires that a party qualify his or her answer or deny only a part of the matter of which an admission is requested, he or she shall specify so

> much of it as is true and qualify or deny the remainder. An answering party may not give lack of information or knowledge as a reason for failure to admit or deny unless he or she states that he or she has made reasonable inquiry and that the information known or readily obtainable by him or her is insufficient to enable him or her to admit or deny. A party who considers that a matter of which an admission has been requested presents a genuine issue for trial may not, on that ground alone, object to the request; he or she may . . . deny the matter or set forth reasons why he or she cannot admit or deny it.
>
> . . . If the court determines that an answer does not comply with the requirements of this rule, it may order either that the matter is admitted or that an amended answer be served.

We consider the guarantor's answer to the Bank's request regarding a prepayment fee in light of the requirements of Rule 36. Rule 36 requires that the answer either "specifically deny the matter" or "set forth in detail the reasons why the answering party cannot truthfully admit or deny the matter." Where the party lacks information, the party shall recite information showing he or she has made reasonable inquiry. In this regard, it is not enough to simply track the language of Rule 36. See *Asea, Inc. v. Southern Pac. Transp. Co.*, 669 F.2d 1242 (9th Cir. 1981). In response to the Bank's request for admission regarding the amount of a prepayment fee owed, the guarantor stated:

> Defendant does not have the information with which to admit or deny the numbers set out under Request for Admissions . . . including principal, interest, default and prepayment amounts. Defendant believes Plaintiff has continued to communicate those matters correctly with David and Nancy Meyer or their counsel and Defendant puts Plaintiff to its strict proof with respect thereto.

The guarantor did not specifically deny that a prepayment fee was owed and instead asserted the inability to admit or deny the matter. However, the answer did not make the required assertions that the guarantor had made reasonable inquiry and

that the information known or readily obtainable by the guarantor was insufficient to enable the guarantor to admit or deny that a prepayment fee was owed. Instead, the answer indicated that other persons, the Meyers, had the information but did not state that the guarantor had made inquiry of the Meyers or attempted to otherwise obtain the information.

We have observed that Rule 36 is based on the federal rules, and we may look to federal cases for guidance. *Tymar, supra*. Where a party neither admits nor denies a request, it has been held that "a response which fails to admit or deny a proper request for admission does not comply with the requirements of [federal] Rule 36(a) if the answering party has not, in fact, made 'reasonable inquiry.'" *Asea, Inc.*, 669 F.2d at 1247. In construing a statute that was a predecessor to Rule 36 and that, like Rule 36, was based on the corresponding federal rule, we relied on federal cases and stated:

> When a request for admissions is made under this section, the party served must answer even though he has no personal knowledge if the means of obtaining the information are available to him. It is not a sufficient answer that he does not know, when it appears that he can obtain the information.

Kissinger v. School Dist. No. 49 of Clay County, 163 Neb. 33, 38, 77 N.W.2d 767, 770 (1956).

From the guarantor's response, it appears that the guarantor could have obtained the information by making inquiry of the Meyers, but the answer fails to indicate that reasonable inquiry of the Meyers was attempted. We concluded in *Kissinger* that based on Rule 36, "[a] bad response is treated as no response at all and hence as an admission." 163 Neb. at 39, 77 N.W.2d at 771. Because the guarantor's response did not comply with the requirements of Rule 36, it was essentially a "bad response" and therefore, effectively, a failure to respond which should have been treated as an admission.

Rule 36(b) provides for the effect to be given to an answer that is treated as an admission. Rule 36(b) provides in part:

> Any matter admitted under this rule is conclusively established unless the court on motion permits withdrawal or amendment of the admission. The court may

> permit withdrawal or amendment when the presentation of the merits of the action will be subserved thereby and the party who obtained the admission fails to satisfy the court that withdrawal or amendment will prejudice him or her in maintaining his or her action or defense on the merits.

In a case where a party failed to answer, we stated that such failure constitutes an admission by that party of the subject matter of the request, and given Rule 36(b), such admission stands as established fact unless, on motion, the court permits withdrawal of the admission. See *Tymar v. Two Men and a Truck*, 282 Neb. 692, 805 N.W.2d 648 (2011).

[7] Rule 36 is self-enforcing, without the necessity of judicial action to effect an admission which results from a party's failure to answer or object to a request for admission. *Id.* However, Rule 36 is not self-executing. Thus, a party that seeks to claim another party's admission, as a result of that party's failure to respond properly to a request for admission, must prove service of the request for admission and the served party's failure to answer or object to the request and must also offer the request for admission as evidence. *Id.* If the necessary foundational requirements are met and no motion is sustained to withdraw an admission, a trial court is obligated to give effect to the provisions of Rule 36 which require that the matter be deemed admitted. *Id.*

In the present case, the district court received the Bank's requests for admissions and the guarantor's answers into evidence at both the hearing on the Bank's motion for summary judgment and the hearing on the guarantor's motion for partial summary judgment. The guarantor made no motion, and the court sustained no motion, to withdraw or amend the guarantor's admission regarding the prepayment fee. Rather than treating the guarantor's answer as a denial, the district court was required under Rule 36 to deem as admitted that the guarantor owed the prepayment fee. We therefore conclude that the district court abused its discretion when it treated the guarantor's answer regarding the prepayment fee as a denial rather than an admission.

The District Court Erred When It Concluded, Based on the Record Before It, That the Guarantor Was Entitled to Judgment as a Matter of Law on the Prepayment Fee Issue.

In light of our conclusion that the district court abused its discretion when it treated the guarantor's answer to the Bank's request for admission regarding the prepayment fee as a denial rather than an admission, we consider the Bank's assignments of error that the court erred when it determined that the guarantor did not owe the prepayment fee, sustained the guarantor's motion for partial summary judgment, and further erred when it overruled in part the Bank's motion for summary judgment. We conclude that, based on the record before it at the time, the court erred when it failed to give legal effect to the substance of the improperly answered request and determined that the guarantor did not owe a prepayment fee and was entitled to judgment as a matter of law on the prepayment fee issue. We therefore reverse the order sustaining the guarantor's motion for partial summary judgment. We remand the cause for further proceedings at which the court should follow the requirements of Rule 36 in its treatment of the guarantor's answer to the Bank's request for admission.

We first address the Bank's claim that the district court erred when it determined that the guarantor did not owe a prepayment fee and sustained the guarantor's motion for partial summary judgment. We find merit to this assignment of error.

[8] When the court decided the guarantor's motion for partial summary judgment, the record included the guarantor's answer to the Bank's request for admission regarding the prepayment fee and, as discussed above, under Rule 36, such answer should have been deemed as an admission that the guarantor owed the prepayment fee. Such admission was in evidence and precluded a conclusion that the guarantor was entitled to judgment as a matter of law on the prepayment fee issue. However, instead of giving effect to the admission, the district court considered the language of the note and concluded that the guarantor did not owe a prepayment fee. It was improper for the court

to ignore the conclusive effect of the admission and to proceed to analyze the note.

In *Tymar v. Two Men and a Truck*, 282 Neb. 692, 805 N.W.2d 648 (2011), we referred to *American Auto. Ass'n v. AAA Legal Clinic*, 930 F.2d 1117, 1120 (5th Cir. 1991), in which it was stated that "[a]n admission that is not withdrawn or amended cannot be rebutted by contrary [evidence] or ignored by the district court simply because it finds the evidence presented by the party against whom the admission operates more credible." Indeed, it has been observed that "[t]he salutary function of [federal] Rule 36 in limiting the proof would be defeated if the party were free to deny at the trial what he or she has admitted before trial." 8B Charles Alan Wright et al., Federal Practice and Procedure § 2264 at 382 (3d ed. 2010). The court erred when it ignored the admission, considered the terms of the note, and sustained the guarantor's motion for partial summary judgment.

[9] The Bank also claims that the court erred in its first order of March 7, 2011, when it overruled the portion of the Bank's motion for summary judgment related to the prepayment fee. We note that the overruling of a motion for summary judgment is not an appealable order, and therefore, the Bank did not and could not have appealed the order overruling in part its motion for summary judgment at the time the order was entered. See *Williams v. Baird*, 273 Neb. 977, 735 N.W.2d 383 (2007) (it has been repeated conclusion of this court that denial of motion for summary judgment is not final order). However, although the denial of a motion for summary judgment, standing alone, is not a final, appealable order, when adverse parties have each moved for summary judgment and the trial court has sustained one of the motions, the reviewing court obtains jurisdiction over both motions and may determine the controversy which is the subject of those motions or make an order specifying the facts which appear without substantial controversy and direct such further proceedings as it deems just. *Hogan v. Garden County*, 264 Neb. 115, 646 N.W.2d 257 (2002). We therefore consider the Bank's motion for summary judgment with regard to the prepayment fee issue in connection with the guarantor's motion for partial summary

judgment on the same issue to determine what further proceedings would be just.

Although the court erred when it treated the guarantor's answer as a denial rather than an admission when it decided the Bank's motion for summary judgment, it would not be just to reverse the partial overruling of the Bank's motion for summary judgment and to remand the cause with an order for the court to grant summary judgment in favor of the Bank on the prepayment fee issue. Although we decline to reverse the overruling, the Bank is free to file a subsequent similar motion after remand.

Under Rule 36, if the court had properly treated the guarantor's answer as an admission, then the guarantor would have been allowed to file a motion to withdraw or amend the admission and to thereafter formally deny that it owed a prepayment fee. We note for completeness that in connection with both the Bank's and the guarantor's motions for summary judgment, the guarantor made arguments in which the guarantor denied that a prepayment fee was owed; however, such denials did not effectively withdraw the admission. Only a motion to withdraw the admission, which the court would have had the discretion to grant, would have achieved such effect. But because the court improperly treated the guarantor's answer as a denial, the guarantor was under the mistaken belief that the answer was an effective denial. It would not be just to deny the guarantor the opportunity to seek to withdraw the deemed admission because the district court erroneously failed to treat the answer as an admission.

We therefore do not reverse the March 7, 2011, overruling of the bank's motion for partial summary judgment on the prepayment fee issue, but do reverse the court's order of January 5, 2012, granting the guarantor's motion for partial summary judgment on the prepayment fee issue. We remand the cause for further proceedings at which the district court should follow Rule 36 with respect to the effect of the guarantor's answer to the Bank's request for admission regarding the prepayment fee. Because the guarantor's answer was a "bad response" and therefore a failure to respond, in accordance with Rule 36, the court should either require an amended answer or treat the

answer as an admission. If the court chooses to treat the answer as an admission, it should thereafter entertain any motion the guarantor might make to withdraw such admission, and the court should exercise its discretion under Rule 36 with regard to such motion.

CONCLUSION

We conclude that the district court abused its discretion when it treated the guarantor's answer regarding the prepayment fee as a denial in contravention of Rule 36. Because the answer in evidence should have been treated under Rule 36 as an admission that the guarantor owed a prepayment fee, the court erred when it ignored the admission, considered the terms of the note, and determined that the guarantor did not owe a prepayment fee and was entitled as a matter of law to partial summary judgment on the prepayment fee issue. We therefore reverse the order sustaining the guarantor's motion for partial summary judgment, and we remand the cause for further proceedings consistent with this opinion.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

WRIGHT, J., not participating.