

STATE OF MICHIGAN
COURT OF APPEALS

HENRY ZUBRYS and MARIJA ZUBRYS,

Plaintiffs-Appellants,

v

HARBOR COUNTRY BANKING COMPANY,
a/k/a PEOPLES STATE BANK,

Defendant-Appellee.

UNPUBLISHED
December 19, 1997

No. 192822
Berrien Circuit Court
LC No. 95-000258-CH

Before: Corrigan, C.J., and Doctoroff and Fitzgerald, JJ.

PER CURIAM.

Plaintiffs appeal as of right the order granting summary disposition in favor of defendant. We affirm.

The material facts in this case are not in dispute. Plaintiffs loaned more than \$60,000 to their son and daughter-in-law (mortgagors) to help the couple with a struggling business. Security for this loan included a second mortgage on the property on which mortgagors' business was located, which plaintiffs accepted with notice of defendant's prior mortgage and superior status as lienholder.

Mortgagors fell behind in their payments to defendant, causing defendant to initiate foreclosure proceedings. However, the parties entered into an agreement to avoid foreclosure at that time. This agreement included mortgagors' tendering to defendant a deed in lieu of foreclosure for the property in question, which defendant retained the option of accepting at a later date. Mortgagors again fell into arrears with defendant, who then accepted and recorded the deed in lieu of foreclosure, took over the premises, and sought buyers. Two years later, when trying to arrange for sale of the property, defendant discovered plaintiffs' lien on the property. To extinguish that lien and clear title on the property, defendant proceeded with foreclosure by advertisement, duly notifying plaintiffs and affording them the opportunity to redeem the property.

After the six-month statutory redemption period expired, plaintiffs filed this action, alleging that defendant's acceptance of the deed caused its security interest in the property to merge into its ownership interest, thus extinguishing defendant's mortgage and right of foreclosure, leaving plaintiffs

now as first mortgagees. Defendant moved for summary disposition under MCR 2.116(C)(10). Finding no genuine issue as to any material fact, the court declared as a matter of law that defendant's interests in the property had not merged, leaving defendant with a superior lien and the right to foreclose on the property. This Court reviews a trial court's decision on a motion for summary disposition de novo as a matter of law. *Miller v Farm Bureau Mutual Ins Co*, 218 Mich App 221, 233; 553 NW2d 371 (1996).

Michigan law provides that a mortgagor whose property is sold pursuant to foreclosure proceedings has a right, within six months of the sale, to redeem the property. MCL 600.3140; MSA 27A.3140. Courts regard with suspicion contracts in which a mortgagor waives the redemption right. *Russo v Wolbers*, 116 Mich App 327, 338-339; 323 NW2d 385 (1982). However, a mortgagor may, in an agreement subsequent to the mortgage, give up the right of redemption in exchange for new consideration. *Id.*; See also *Hogan v Hester Investment Co*, 257 Mich 627, 634-635; 241 NW 881 (1932).

In the instant case, the agreement between defendant and mortgagors provided that in consideration for defendant's acceptance of the deed in lieu of foreclosure defendant would release mortgagors of all obligations under the mortgage. Plaintiffs dispute the adequacy of this consideration. However, because mortgagors have never raised this defense, and because plaintiffs were neither party to the contract nor are they mortgagors' representatives in this action, plaintiffs lack standing to allege failure of consideration. Because there is no controversy on this point between the parties to the contract, we will not question the sufficiency of the consideration for the deed in lieu of foreclosure.

Where merger of mortgage and title in a piece of real property is at issue, the mortgagee's intent is usually controlling. *Union Bank & Trust Co v Farmwald Development Corp*, 181 Mich App 538, 546-547; 450 NW2d 274 (1989). While in many cases where a mortgagee acquires fee title to the mortgaged property there is no reason to preserve the lien of the mortgage, if it is in the mortgagee's interest to preserve his lien separately from the fee, it will ordinarily be concluded that he did not intend to merge the lien into the fee. *Sylvania Savings Bank v Turner*, 27 Mich App 640, 645; 183 NW2d 894 (1970). A mortgagee who accepts a properly executed deed in lieu of foreclosure, and who does not indicate an intention to merge its interests, keeps the mortgage alive with respect to junior mortgagees, and retains its right of foreclosure superior to them. See *Titus v Cavalier*, 276 Mich 117, 121; 267 NW 799 (1936); *Clark v Federal Land Bank*, 167 Mich App 439, 444-445; 423 NW2d 220 (1987).

Plaintiffs argue that language in the agreement drafted by defendant that acceptance of the deed in lieu of foreclosure would constitute "absolute conveyance of the title . . . to the grantee . . . in effect as well as in form," that it "is not intended as a mortgage, trust, conveyance, or security of any kind," and that acceptance meant "full cancellation of all debts, obligations, costs and charges heretofore existing under and by virtue of the terms of a certain mortgage (in default)" indicates defendant's intention to extinguish its security interest in the property. However, defendant took pains to state otherwise, declaring in a contract signed by both parties and recorded with the register of deeds that acceptance of the deed in lieu of foreclosure "shall not be determined to release the Bank's note," that defendant's "note and the real estate mortgage shall not merge," and that defendant "shall have a first lien position

with respect to all collateral given as security as referred herein.” Further, the deed that defendant accepted and recorded announces itself as a deed in lieu of foreclosure, putting any interested party on notice that the conveyance resulted from, and remained subject to, the intricacies of state law that govern foreclosures, including the principle that a mortgagee acquiring title normally preserves the mortgagee’s security rights in the property apart from the ownership rights when it is in the mortgagee’s interest to do so. The circuit court was only acknowledging the obvious when it declared that it was defendant’s intention that there be no merger of its interests.

The law may recognize a merger of a mortgagee’s ownership and security interests, despite the mortgagee’s contrary intention and interest, where the rights of third parties are affected. *Anderson v Thompson*, 225 Mich 155, 159; 195 NW 689 (1923); *Union Bank, supra* at 547. However, a party accepting a junior mortgage with knowledge of the senior mortgagee’s interest may not claim that its rights are affected when the senior mortgagee intends to release the mortgagor while keeping the mortgage alive. *Titus, supra* at 120-121; *Union Bank, supra* at 547-548. Thus, plaintiffs may not claim that their interests militate against recognition of defendant’s plainly stated intention that there be no merger.

Plaintiffs further argue that the agreement between defendant and mortgagors was unconscionable, and that there were ambiguities in the documents that should be resolved against the interests of defendant as drafter. We need not consider these arguments as they are not plaintiffs’ to make. Because defendant and mortgagors fully performed under their contract, this Court accepts the validity of that agreement.

Affirmed.

/s/ Maura D. Corrigan
/s/ Martin M. Doctoroff
/s/ E. Thomas Fitzgerald