

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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N & T PROPERTIES, INC,

Plaintiff- Appellant,

v

SURPLUS PROCEEDS OF FORECLOSURE  
SALE, MICHAEL PONTONI and LAURIE  
PONTONI,

Defendants- Appellees.

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UNPUBLISHED

October 6, 1998

No. 196507

Allegan Circuit Court

LC No. 96-019347

Before: Markey, P.J., and Griffin and Whitbeck, JJ.

PER CURIAM.

Plaintiff appeals by right the trial court's June 24, 1996 order directing the payment to defendants of surplus proceeds resulting from a foreclosure sale. We reverse.

On June 1, 1994, defendants Michael and Laurie Pontoni recorded a mortgage in the amount of \$120,000 with Old Kent Bank as mortgagee. The mortgage was secured by defendants' residence, unit 54 at Tower Harbor Condominiums in Allegan County. Defendants recorded a second mortgage on November 23, 1994 in the amount of \$50,000 with Tower Marine and Mariner's Cove as mortgagees. Old Kent also gave a third mortgage on defendants' property in the amount of \$17,300, recorded January 3, 1995. Thus, within seven months, defendants had secured \$187,300 in mortgages on their condominium.<sup>1</sup>

In September 1995, Tower foreclosed on the second mortgage which had a balance of \$53,214.61 and held a foreclosure sale. Plaintiff placed the highest (and only) bid of \$184,308.94<sup>2</sup> at the foreclosure sale. The second mortgage balance of \$53,214.61 was paid out of the \$184,308.94 purchase price, leaving a balance of \$131,094.33. This amount was deposited with the Allegan County treasurer. Old Kent then foreclosed on its first mortgage, bidding \$126,237.75 at the January 18, 1996 foreclosure sale, which represented the principal balance plus accrued interest. Plaintiff paid \$127,520.88 to Old Kent in order to redeem the property from the January 1996 foreclosure sale. On February 27, 1996, Old Kent filed a claim to recover the balance of its third mortgage, or \$12,472.84,

against the proceeds being held in the treasurer's office. Plaintiff also filed its claim against these same funds on March 11, 1996.

The trial court ruled that under MCL 600.3252; MSA 27A.3252, Old Kent, as a subsequent mortgagee, was entitled to payment out of the surplus funds in satisfaction of its third mortgage on defendant's condominium and that the balance of any surplus would be paid to defendants.

Plaintiff argues that by redeeming the property from the January 18, 1996 foreclosure sale for \$127,520.88, plaintiff acquired a redemption lien against the excess funds in that amount and is entitled to the excess funds as an equitable titleholder.<sup>3</sup> Plaintiff is not, however, a lien claimant or a subsequent mortgagee as intended by the surplus statute. MCL 600.3240(4), (5); MSA 27A.3240(4), (5), *Schwartz v Oakland County Sheriff*, 4 Mich App 628, 631; 145 NW2d 357 (1966). For the reasons stated below, we disagree that MCL 600.3252; MSA 27A.3252, the surplus statute, entitles either plaintiff or defendant to recover the excess funds paid at the sale of defendants' second mortgage. Nevertheless, given the unique factual situation presented to this Court and the injustice of treating the excess funds from the second mortgage foreclosure sale as "surplus," as that term is apparently used in the statute, we find that plaintiff is entitled to recover the monies held by the Allegan County Treasurer.

MCL 600.3252; MSA 27A.3252 governs the distribution of the surplus proceeds of a foreclosure sale and reads in pertinent part:

If after any sale of real estate, made as herein prescribed, there shall remain in the hands of the officer or other person making the sale, any surplus money after satisfying the mortgage on which the real estate was sold, and payment of the costs and expenses of the foreclosure and sale, the surplus shall be paid over by the officer or other person on demand, to the mortgagor, his legal representatives or assigns, unless at the time of the sale, or before the surplus shall be so paid over, some claimant or claimants shall file with the person so making the sale, a claim or claims . . . that the claimant has a subsequent mortgage or lien encumbering the real estate, or some part thereof . . .

The facts in this case clearly indicate that plaintiff grossly, and apparently mistakenly, overpaid at the second mortgage foreclosure sale. In fact, plaintiff's successful bid at the second mortgage sale exceeded the combined amounts of both the first and second mortgages. It would be a travesty of justice and an unconscionably rigid application of the statute for us to conclude that such an inadvertent overpayment be categorized as "surplus money" as contemplated by §3252.<sup>4</sup>

Our reading of the statute and the case law it generated leads us to conclude that the Legislature intended the surplus statute to reimburse the defaulted mortgagor for any market value increase in the property, any increase in equity attributable to the mortgagor's contributions which thereby increased the property value, or for any competitive bidding that ensued at the foreclosure sale. Surpluses may also be attributable to the redeeming party's payment of attorney fees and other similar expenses. See *Macomb v Wilkinson*, 83 Mich 486, 493; 47 NW 336 (1890). We cannot conclude that the Legislature intended, or indeed even contemplated, that the statute apply where, as here, an error

resulted in a foreclosure bid that exceeded the mortgage price by over \$130,000. Thus, we cannot hold that such an error in calculation constitutes a “surplus” for purposes of MCL 600.3252; MSA 27A.3252. In short, we are convinced that the instant fact scenario falls within neither the contemplation of the Legislature nor the intent of the statute.

Notably, this statute was enacted in part to protect subsequent mortgagee claimants and lien holders. *Schwartz v Oakland County Sheriff*, 4 Mich App 628, 632; 145 NW2d 357 (1966). Subsequent mortgagee Old Kent Bank arguably deserves to be protected in light of its third mortgage on the property. As a practical matter, we also will permit Old Kent Bank to simultaneously satisfy its outstanding mortgage out of the excess payment plaintiff made at the second mortgage foreclosure sale in acknowledgment that the same result would inevitably be achieved. Indeed, plaintiff has invested a total of \$257,332.08 at two mortgage foreclosure sales to protect its interest in the condo. Plaintiff would undoubtedly pay the additional \$12,472.84 to completely protect its interest in the condo. Thus, for the sake of efficiency, we will concur in requiring the Allegan County treasurer to pay Old Kent Bank the \$12,742.84 due and owing on the third mortgage with the payoff being credited to plaintiff before the treasurer returns the remaining funds to plaintiff. This ruling depletes the excess overpayment fund, yet still leaves plaintiff with a loss.

In further support of our conclusion, we note that none of the cases applying the surplus statute present remotely similar fact scenarios to the instant case. Applying them here would be akin to attempting to fit a round peg into a square hole. Forcing application of this statute when it was never intended to address the parties’ unusual dilemma and would work a grave injustice against plaintiff and result in a windfall to defendants, despite their unsupported allegations to the contrary.<sup>5</sup>

We therefore hold that MCL 600.3252; MSA 27A.3252 has no application in the case at bar because the unique circumstances that gave rise to the excess fund take this case outside the realm of this statute.

We reverse.

/s/ Jane E. Markey

/s/ Richard A. Griffin

<sup>1</sup> Because this case was submitted to the trial court on stipulated facts, we do not know how long defendants had resided in the condo before they acquired these mortgages or whether defendants invested their own funds into the condo and if so, how much.

<sup>2</sup> Nothing in the stipulation of facts explains how plaintiffs arrived at this number, but it appears that it was calculated to cover both the second and first mortgages on the condo.

<sup>3</sup> "The title acquired by a purchaser at a foreclosure sale is all the right, title, and interest in and to the mortgaged premises the *mortgagors* [i.e., defendants] possessed at the time the mortgage was

executed" (emphasis added). *Schwartz v Oakland County Sheriff*, 4 Mich App 628, 631; 145 NW2d 357 (1966).

<sup>4</sup> We do not, however, fault the trial court in applying the statute.

<sup>5</sup> Although the stipulated facts submitted to the trial court are silent as to the amount of equity that defendants accrued in this property, we are cognizant that foreclosure proceedings began ten months after defendants obtained their second mortgage and fourteen months after they secured their first mortgage on the condo. Apparently, the only mortgage that defendants paid sufficiently to reduce the mortgage principal was on the third, and that mortgage will be paid out of the excess from the second mortgage foreclosure.