STATE OF MICHIGAN

COURT OF APPEALS

LYNDA L. HEATHSCOTT, f/k/a LYNDA L. McLEOD,

Plaintiff-Appellant,

v

NBD BANK,

Defendant-Appellee.

UNPUBLISHED
June 8, 1999

No. 206575
Saginaw Circuit Court
LC No. 96-014236 CZ

Before: Markman, P.J., and Hoekstra and Zahra, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's order denying her motion for partial summary disposition and granting defendant's motion for summary disposition pursuant to MCR 2.116(C)(10). We affirm.

The dispute in this case centers on whether loan proceeds disbursed by defendant to plaintiff's former husband, Timothy McLeod, were secured by a valid mortgage on their marital residence. Plaintiff and McLeod graduated from law school together in 1978, were married in February 1980, and divorced in 1990. In 1980, they bought a house, giving a first mortgage to the purchase money lender. Subsequently, through McLeod's representation of defendant, he developed a working relationship with employees of defendant, including Charles Hartley, an NBD Loan Officer. On March 5, 1987, plaintiff and McLeod borrowed $7,500 from defendant, which defendant secured by taking a second mortgage on their house.

The gravamen of this case concerns a subsequent transaction through which the outstanding balance of the 1987 loan was rolled into a new loan and $20,000 in new money was advanced to McLeod and purportedly secured by a new second mortgage on the same property. This mortgage is dated November 11, 1988. According to plaintiff, McLeod forged her signature on these 1988 loan documents without her knowledge or consent. Defendant's employees purported to witness and notarize the transaction, when they admittedly did not observe plaintiff sign any documents. Further, a $20,000 cashier's check made payable only to McLeod was used to disburse the new money associated with this transaction.

Plaintiff contended that she was unaware of the 1988 loan and mortgage until October, 1995. However, sometime on or after November 11, 1988, plaintiff signed a document entitled "Mortgage Amendment" which specifically referenced the 1988 mortgage.[1] As with the 1988 mortgage, the mortgage amendment offered the marital home as security for any past or future loans advanced by defendant. The mortgage amendment, which was recorded March 16, 1990, stated that it amended the November 11, 1988, mortgage as follows:

> To secure the repayment on or before five years from the date hereof such sums of money as mortgagee may have heretofore advanced or may hereinafter advance to mortgagor up to the maximum sum of FORTY FOUR THOUSAND ONE HUNDRED SEVENTY FIVE AND 23/100.

The mortgage amendment further provided that "All other terms and conditions of the original mortgage will remain in full force and effect." The November 11, 1988, mortgage defined the mortgagor as "Timothy McLeod and Lydia McLeod, jointly and severally." No funds were given to McLeod or plaintiff in conjunction with the execution of the mortgage amendment.

On June 1, 1990, at McLeod's request, defendant released plaintiff from personal liability on the 1988 loan that was secured by the mortgage on the marital home. The mortgage, however, remained on the marital home. On July 12, 1990, as part of their divorce agreement, McLeod conveyed his interest in the marital home to plaintiff, under terms by which it would be reconveyed to him if he paid off or refinanced certain debts within five years. If he failed to do so, his possession and right to reconveyance would be forfeited. Defendant was aware that McLeod did not hold title to an ownership interest in the home and that his right to have title conveyed to him was subject to defeasance. On April 12, 1991, defendant rolled McLeod's debt into a new loan and advanced him an additional $11,000. On July 6, 1992, defendant further advanced McLeod the sum of $25,735 and took an additional mortgage from him on the marital property even though McLeod at that time held only a contingent right of reconveyance.[2]

In 1995, McLeod was ordered to surrender possession of the house to plaintiff and McLeod's right to reconveyance was lost. On May 2, 1996, plaintiff filed her complaint seeking discharge of all liens and mortgages on the marital home claimed by defendant. While this action was pending, plaintiff secured a buyer for the marital home. Because the validity of defendant's liens remained in dispute, the parties agreed that plaintiff would escrow sums from the sale of the home until the issue was resolved.

Plaintiff moved for partial summary disposition arguing that defendant was not entitled to any of the escrowed funds because: (1) the 1988 mortgage transaction was unenforceable under the statute of frauds, MCL 566.108; MSA 26.908; (2) the 1988 mortgage transaction was void or voidable because it resulted from a fraud on plaintiff in which defendant participated; and (3) even if the 1988 mortgage was enforceable, all of the debt which it secured had been paid. Defendant brought a counter-motion for summary disposition under MCR 2.116(C)(10), asserting that plaintiff had ratified the 1988 mortgage by signing the 1990 mortgage amendment. The trial court denied plaintiff's motion for partial summary disposition but granted defendant's counter-motion.

This Court reviews decisions on motions for summary disposition de novo. *Spiek v Transportation Dep't*, 456 Mich 331, 337; 572 NW2d 201 (1998); *Kuhn v Secretary of State*, 228 Mich App 319, 323; 579 NW2d 101 (1998). On a motion under MCR 2.116(C)(10), "[t]he court considers the affidavits, pleadings, depositions, admissions, and other documentary evidence submitted or filed in the action to determine whether a genuine issue of any material fact exists to warrant a trial." *Spiek*, *supra*. All reasonable inferences are resolved in the nonmoving party's favor. *Bertrand v Alan Ford, Inc*, 449 Mich 606, 617-618; 537 NW2d 185 (1995).

I.

First, with respect to whether the statute of frauds invalidated the mortgage transaction, we agree with the trial court that plaintiff's voluntary signing of the mortgage amendment, which made specific reference to the 1988 mortgage, resolved any dispute regarding compliance with the statute of frauds. A mortgage is a security interest in real property and thus, its conveyance is subject to the provisions of the statute of frauds as it applies to transactions involving interests in land. MCL 566.106; MSA 26.906, MCL 566.108; MSA 26.908; *Schultz v Schultz*, 117 Mich App 454, 457; 324 NW2d 48 (1982). "All owners of jointly held property must sign a contract conveying an interest in the property; the absence of a signature by a co-owner renders the contract void." *Forge v Smith*, 458 Mich 198, 206; 580 NW2d 876 (1998). Further, "contracts conveying an interest in land made by an agent having no written authority are invalid under the statute of frauds unless ratified by the principal." *Id.* at 208-209.

Without written authorization to sign on his wife's behalf, McLeod could not satisfy the statute of frauds by signing his wife's name as her agent. Hence, absent a distinct act of ratification by plaintiff, the 1988 mortgage would be void. *Id.* at 208-209. In this case, however, there was a distinct act of ratification; the execution of a document that referenced the questionably executed writing and which, when read together with it, satisfied the statute of frauds. When "one writing references another instrument for additional contract terms, the two writings should be read together." *Forge*, *supra*. at 207. Therefore, whether viewed as the written ratification of an act by plaintiff's agent, or as a document which itself satisfied the statute of frauds and incorporated the earlier mortgage document by reference, the mortgage amendment served to resolve any issue concerning the enforceability of the 1988 mortgage under the statute of frauds.

We find no merit in plaintiff's claim that the mortgage could not be ratified as a matter of law because it was procured through defendant's fraud. Ratification is prohibited as a matter of law only where the substance of the contract at issue is violative of established public policy or the criminal law. We find this conclusion consistent with our Supreme Court's articulation of the purpose underlying the statute of frauds:

> We think the purpose of the statute is important in determining whether certain contracts may be ratified. If the law prohibits a contract under criminal penalty or as a matter of general public policy or specifically denies the right to make it, of course it could not be legalized by ratification. *But, where the purpose of the statute is civil, to prevent fraud, to fix the rights only of contracting parties, and the invalidity is not in the*

> *subject-matter of the agreement but merely in the manner of execution, there is no good reason for denying right of ratification through subsequent observance of the statutory requirements.* If, finally, the contract is adopted or the authority of the agent confirmed, in writing, the statutory requirements are observed, and ratification amounts to no more than completing execution of the contract which before hand had not been fully executed. [*Fine Arts Corporation v Kuchins Furniture Mfg Co*, 269 Mich 277, 282; 257 NW2d 822 (1934) (emphasis added).][3]

II

Also without merit is plaintiff's allegation that the 1988 mortgage is void as a product of fraud in the inducement and/or execution. The mortgage amendment executed by plaintiff specifically provided:

> This agreement, made November 11, 1988, between Timothy R. McLeod* and Lynda L. McLeod, hereinafter referred to as "the Mortgagor", whose address is 5628 Cathedral, Saginaw, MI 48603, and NBD SAGINAW, a Michigan Banking Corporation, hereinafter referred to as "Mortgagee", whose address is 1156 N. Niagara Street, Saginaw, MI 48602, amends the Mortgage dated November 11, 1988 and recorded in Liber 1735, Page 1455, to read as follows:
>
> * married man
>
> To secure the repayment on or before five years from the date hereof such sums of money as Mortgagee may have heretofore advanced or may hereinafter advance to Mortgagor up to the maximum sum of FORTY-FOUR THOUSAND ONE HUNDRED SEVENTY-FIVE AND 32/100 ($44,175.32).
>
> All other terms and conditions of the original mortgage will remain in full force and effect. The property is described as follows:
>
> Lot 80, Mission Park, according to the Plat thereof recorded in Liber 21, Pages 33 and 34 of Plats, Saginaw County Records.

By this mortgage amendment, not only was plaintiff put on notice of the existence of the 1988 mortgage, she affirmed the encumbrance on the marital home in this new agreement which, while incorporating the terms of the 1988 mortgage, also included new and different terms. Under these circumstances, we conclude that any claim of fraud in the inducement or execution of the 1988 mortgage was waived by plaintiff's subsequent acts. See, e.g., *Zounes v Dassios*, 233 Mich 651, 653; 207 NW 868 (1926).

Plaintiff's position that she thought that the reference to the 1988 mortgage, was actually to the original February, 1987, mortgage of which she was aware, would not yield a different result. In *Scholz v Montgomery Ward & Co*, 437 Mich 83, 92; 468 NW2d 845 (1991), the Supreme Court noted that it is well settled that the failure of a party to obtain an explanation of a contract is ordinary negligence which estops the party from avoiding the contract on the ground that the party was ignorant of the contract provisions. The Court further recognized that:

> [t]he stability of written instruments demands that a person who executes one shall know its contents or be chargeable with such knowledge. If he cannot read, he should have a reliable person read it to him. His failure to do so is negligence which estops him from voiding the instrument on the ground that he was ignorant of its contents, in the absence of circumstances fairly excusing his failure to inform himself. *Sponseller v Kimball*, 246 Mich 255, 260; 224 NW 359 (1929). [*Id.*]

In this case, plaintiff was a sophisticated party to the transaction who was charged with the knowledge of the contents of the contract she signed.[4]

III

Finally, we reject plaintiff's alternative argument that the debt associated with the 1988 mortgage was paid in full and therefore discharged. Plaintiff relies upon the following facts. Loan closing documents associated with the November 11, 1988, loan and mortgage indicated that of the $25,700 loaned, defendant retained approximately $5,700 as payment in full of the balance on the original loan in 1987 of $7,500. Plaintiff then contends that as a result of a similar transaction in April, 1991, whereby additional sums were loaned, the loan associated with the 1988 mortgage was similarly "paid off." This type of transaction apparently occurred again in 1992. In essence, existing loan balances were rolled into new and larger loans. The flaw in plaintiff's argument is that she uses the terms "loan" and "mortgage" synonymously. However, a mortgage is an independent encumbrance on real property. The discharge of a mortgage is dictated by its terms; not necessarily by the terms of any loan document that may have been executed simultaneously with the mortgage. By the very language of the mortgage amendment, plaintiff agreed to encumber the marital home to secure "such sums of money as Mortgagee may have heretofore advanced or may hereafter advance to Mortgagor up to the maximum sum of FORTY-FOUR THOUSAND ONE HUNDRED SEVENTY-FIVE AND 32/100."

We also reject plaintiff's claim that the mortgage did not secure the loan made in April, 1991, because the loan proceeds were payable to Timothy McLeod and not plaintiff. The November 11, 1988, mortgage defined "the mortgagor" as "Timothy McLeod and Lynda McLeod, jointly and severally." The mortgage amendment executed by plaintiff on February 27, 1990, incorporated by reference this definition of "mortgagor." Thus, this mortgage secured loans advanced to Timothy McLeod, plaintiff or both. Simply put, plaintiff contractually agreed that the marital home would secure future loans. It is legally irrelevant that the mortgage secured money advanced only to Timothy McLeod well after the 1988 mortgage was executed and/or ratified by plaintiff. Plaintiff agreed that the marital home would be available to secure such future loans. Therefore, we find without merit plaintiff's argument that the loan relative to the 1988 mortgage was paid in full.

Affirmed.

/s/ Stephen J. Markman
/s/ Joel P. Hoekstra
/s/ Brian K. Zahra

[1] The document entitled "Mortgage Amendment" was purportedly made November 11, 1988, but was not notarized until February 27, 1990. For ease of reference, this document shall be referenced throughout this opinion as the "mortgage amendment."

[2] The trial court did not premise its grant of summary disposition to defendant upon the July 6, 1992 mortgage executed by McLeod.

[3] The substance of the contract at issue in this case relates to a mortgage. Mortgaging real estate does not violate Michigan law or public policy. Plaintiff objects to the manner in which the contract was executed. However, plaintiff must be held accountable for the written mortgage amendment that she freely and voluntarily signed. *Scholz v Montgomery Ward & Co,* 437 Mich 83, 92; 468 NW2d 845 (1991).

[4] Plaintiff also argues that defendant's judgment must be vacated because it is premised upon equity and the doctrine of unclean hands bars defendant from invoking equity. We do not agree that defendant has invoked equitable principles to sustain its case. Defendant relies upon a written document, signed by plaintiff, which incorporates by reference and expressly ratifies the prior mortgage document The documents satisfy the requirements of the Statute of Frauds. Equity simply is not the basis for defendant's judgment.