

STATE OF MICHIGAN
COURT OF APPEALS

BANK ONE FENTON,

Plaintiff-Appellee,

and

RANDY SCHLIEWE and JUDITH SCHLIEWE,

Intervening Plaintiffs-Cross
Defendants-Appellees,

and

BENNIE IAQUINTA,¹

Intervening Plaintiff-Appellee,

v

EDWARD W. BLAZO, EILEEN F. BLAZO, G & B
ASSOCIATES, INC. and G & B PROPERTIES
d/b/a BLAZO'S RESTAURANT & PIE SHOPPE,

Defendants-Appellees,

and

NEIL F. BROWNE and ALINE B. BROWNE,

Defendants-Third-Party Plaintiffs-
Cross-Plaintiffs-Appellants,

and

THE HEIGHTS, INC.,

UNPUBLISHED
October 1, 1999

No. 205568
Genesee Circuit Court
LC No. 93-025014 CK

Third-Party Defendant.

NEIL F. BROWNE and ALINE B. BROWNE,

Plaintiffs-Cross-Plaintiffs-Appellants,

and

RANDY SCHLIEWE and JUDITH A. SCHLIEWE,

Intervening Plaintiffs-Cross-
Defendants-Appellees,

v

No. 205570
Genesee Circuit Court
LC No. 93-025833 CH

EDWARD W. BLAZO, EILEEN F. BLAZO and G
& B PROPERTIES d/b/a BLAZO'S RESTAURANT
& PIE SHOPPE,

Defendants-Appellees.

Before: Gribbs, P.J., and Griffin and Wilder, JJ.

PER CURIAM.

In these consolidated cases, Neil and Aline Browne appeal as of right from the trial court's order granting summary disposition under MCR 2.116(C)(9) and (10) to Randy and Judith Schlieve. We reverse and remand.

In Docket No. 205568, Bank One, which held a first mortgage on Fenton property owned by Edward and Eileen Blazo, filed a complaint for foreclosure against the Blazos.² In Docket No. 205570, Neil and Aline Browne, who held a second mortgage on the same Fenton property, filed a complaint for foreclosure against the Blazos and several others who held an interest of record on the property. After consolidating the two cases, the trial court granted Bank One's motion for summary disposition as to most counts³ and ordered Eileen Blazo to pay Bank One \$432,707.63, and Edward and Eileen Blazo, jointly and severally, to pay the Brownes \$153,772.06 and then Bank One \$14,827.29, in that order. The trial court also granted a judgment of foreclosure to the Brownes and granted them authority to conduct a sale of the Fenton property if the Blazos did not pay Bank One and the Brownes.

In December 1994, the Fenton property was sold for \$325,000; however, the proceeds were insufficient to compensate Bank One entirely, and it was left with a deficiency of \$115,872.86. The Brownes, as second mortgagees, received none of the proceeds from the sale of the Fenton property. Thus, the trial court issued a writ of execution for property owned by the Blazos in Roscommon. In

order to satisfy the deficiency owed to Bank One and the mortgage held by the Brownes, the Roscommon property was sold at a public auction on July 11, 1996, and transferred to the purchaser, Lawrence Porath, by sheriff's deed. The Brownes received approximately \$100,000 from the sale of the Roscommon property.

In September 1996, Randy and Judith Schlieve,⁴ as holders of a \$20,000 demand note and recorded mortgage on the Roscommon property, intervened in the lawsuit against the Blazos and the Brownes. The Schlieves alleged that the Blazo's mortgage on the Roscommon property had been in default since August 1994, and they claimed a \$20,000 interest in the sale proceeds arguing that their interest in the Roscommon property was superior to that of Benny Iaquina (who had been assigned Bank One's interest), the Brownes, and Lawrence Porath. The Brownes filed a cross-complaint against the Schlieves challenging the validity of their mortgage on the Roscommon property. Thereafter, the Brownes and the Schlieves both filed motions for summary disposition. The trial court ordered the Brownes to deposit \$20,000 of the sale proceeds with the court to be held in escrow pending resolution of the dispute.

Prior to the hearing on the parties' motions, Eileen Blazo transferred her interest in the Roscommon property to her sons, William and James Blazo, who redeemed the property from Porath. After oral arguments on the parties' motions, the trial court granted summary disposition to the Schlieves holding that they were entitled to the \$20,000 because their interest in the Roscommon property was first in time and properly recorded. However, because the \$20,000 was still in escrow and was earning interest, the trial court stayed the proceedings pending the Brownes' appeal to this Court.

A trial court's grant of summary disposition is reviewed de novo on appeal. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). A motion for summary disposition brought under MCR 2.116(C)(9) tests whether the opposing party has failed to state a valid defense to the claim asserted against it. *Hubscher & Son, Inc v Storey*, 228 Mich App 478, 480; 578 NW2d 701 (1998). This Court looks only to the pleadings and, accepting all well-pleaded allegations as true, determines whether the defenses are so clearly untenable as a matter of law that no factual development could possibly deny a plaintiff's right to recovery. *Id.*

A motion brought under MCR 2.116(C)(10) is properly granted when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Munson Medical Center v Auto Club Ins Ass'n*, 218 Mich App 375, 386; 554 NW2d 49 (1996). The motion is decided on the basis of the pleadings, affidavits, depositions, admissions and other available evidence. *Id.* Summary disposition is appropriate if the opposing party fails to present documentary evidence establishing the existence of a material factual dispute. *Quinto v Cross & Peters Co*, 451 Mich 358, 363; 547 NW2d 314 (1996).

The general rule concerning competing interests on real property is "first in time, first in right." *Cheboygan Co Construction Code Dep't v Burke*, 148 Mich App 56, 59; 384 NW2d 77 (1985). Before the Brownes became judgment creditors on the Roscommon property, the Blazos held the land in fee, and the Schlieves held a first mortgage on the property that was properly recorded and payable

on demand. The Schliewes were first in time, and therefore, they had an interest in the Roscommon property that was senior to that of the Brownes. Thus, had the Schliewes been party to the Brownes foreclosure, they would have been first in line for the proceeds of the sale. However, the Schliewes did not intervene to file their complaint of foreclosure against the Blazos until September 4, 1996, almost two full months after the execution sale. Therefore, because the mortgage had not been foreclosed upon, the execution purchaser, Lawrence Porath, took the property on July 11, 1996, subject to the Schliewes' mortgage. See *Midwest Bank v O'Connell*, 158 Mich App 565, 569; 405 NW2d 201 (1987).

In holding that the Schliewes were entitled to be paid because they were first in time, the trial court overlooked the fact that, at the time the property was sold, the Schliewes had not exercised their right to foreclose, and thus, were not entitled to proceeds of the sale. A court cannot go back in time and change the nature of a real property transaction once it has occurred. Here, Lawrence Porath had already taken the property subject to the Schliewes' mortgage before the Schliewes filed their foreclosure complaint.

Moreover, grantees of a quitclaim deed acquire only the right and title of the grantor and no more. *Quinlan Investment Co v The Meehan Cos, Inc*, 171 Mich App 635, 642; 430 NW2d 805 (1988). Therefore, when Eileen Blazo quitclaimed her interest in the Roscommon property to her sons, and the sons redeemed the property, they acquired nothing more than what Lawrence Porath would have had: a fee simple interest subject to the Schliewes' mortgage. Thus, because the Schliewes' mortgage continues in effect, they have a right to demand payment on their mortgage from William and James Blazo and a right to foreclose on the property if their demand is not met. MCL 600.3101 *et seq.*; MSA 27A.3101 *et seq.* and MCL 600.3201 *et seq.*; MSA 600.3201 *et seq.* The fact that the persons who redeemed the property are relatives of the debtors is irrelevant.

In Michigan, one who purchases mortgaged property at a sheriff's sale takes title to that property subject to the mortgage. MCL 600.6061; MSA 27A.6061; *Midwest Bank, supra* at 569. See also *First of America Bank-Oakland Macomb, NA v Brown*, 158 Mich App 76, 80; 404 NW2d 706 (1987). The Schliewes contend that this law is inapplicable in this case because the sheriffs, acting as agents for the Brownes, misrepresented the property as "free and clear" to the execution purchaser. The Schliewes rely on *Messmore v Haggard*, 46 Mich 558; 9 NW 853 (1881), which they assert stands for the proposition that a judgment creditor loses the right to contest the mortgage when he fails to file proceedings supplemental to judgment challenging the mortgage. We find defendant's reliance on *Messmore* misplaced. The *Messmore* Court simply held that a judgment creditor cannot buy the property at the execution sale, then later challenge the mortgage as fraudulent. *Id.* at 564. The Court's rationale was that this would give the judgment creditor an unfair advantage over all other prospective buyers because it would allow him to bid more than anyone else, knowing that the title would actually be unencumbered by any mortgage. *Id.* at 563-564. This was simply not the case in the instant matter.

The Schliewes further contend that the decision in *Messmore* reflected the public policy of this state that equity will not permit a judgment creditor to profit by deliberately misleading others about whether the property is subject to a mortgage, and that this policy was violated when the Brownes

informed the prospective purchasers (through the sheriff as their agent) that the property was not subject to any mortgage. The Schliewes argue that this allowed the Brownes to receive a higher amount of the proceeds, leaving the innocent purchaser to pay off a mortgage for which he never bargained.

Under the current statutory scheme, sheriffs are not agents of judgment creditors, but instead are officers of the state. “Whenever a judgment is rendered in any court, execution to collect the same may be issued to the sheriff, bailiff, or other proper *officer of any county, district, court district or municipality of this state*. MCR 600.6001; MSA 27A.6001 (emphasis added). Sheriffs act by authority of writs of execution issued by the court, not at the direction of the judgment creditor. See MCL 600.6002(3); MSA 27A.6002(3). Further, sheriffs are themselves liable for any fraud they may commit in executing a sale. “[I]f [the officer] is guilty of any fraud in the sale . . . he shall be liable in a civil action, brought by the party injured . . .” MCL 600.6010; MSA 27A.6010. Finally, sheriffs may not have a direct or indirect interest in the sale. “The sheriff or other officer . . . shall not directly or indirectly, purchase or be interested in the purchase of any property at any sale by virtue of execution.” MCL 600.6046; MSA 27A.6046. Because sheriffs must be disinterested and impartial, they “lack the usual characteristic of a private agent, which implies an interest favorable to one party and adverse to the other.” *Stark Hickey, Inc, v Standard Accident Ins Co*, 291 Mich 350, 357; 289 NW 172 (1939) quoting *Gross v Gates*, 109 Vt 156; 194 A 465 (1937). Therefore, because the relationship between the sheriff and the Brownes was not that of agent and principal, any misrepresentation made by the sheriff had no bearing on any party’s claim to the property or the proceeds of the sale. Accordingly, we reject this argument.

In light of our conclusion that the Schliewes are not entitled to any proceeds of the execution sale, we need not address the Brownes’ alternative argument that, if anything, the Schliewes are only entitled to a pro rata share of the proceeds.

Reversed and remanded for action consistent with this opinion. We do not retain jurisdiction.

/s/ Roman S. Gribbs
/s/ Richard Allen Griffin
/s/ Kurtis T. Wilder

¹ Citizens Commercial Bank was the successor to Bank One after a merger, and Citizens assigned its interest in the judgment to Bennie Iaquina who was substituted as plaintiff in Bank One’s place pursuant to a trial court order.

² Bank One subsequently filed an amended complaint listing as defendants all individuals with an interest in the property, including the Brownes.

³ The trial court denied Bank One’s motion for summary disposition without prejudice on Count III of its complaint (claim for possession of all fixtures and personal property on the Fenton property), and

dismissed without prejudice Count V of Bank One's complaint (claim for assignment of rents and profits).

⁴ Judith and Randy Schlieve are Edward and Eileen Blazo's daughter and son-in-law.