STATE OF MICHIGAN

COURT OF APPEALS

CHRISTOPHER R. KENRICK,

Plaintiff-Appellee,

V

LUANN M. KENRICK,

Defendant-Appellant,

and

LEWIS MASTERS,

Intervenor-Appellant.

UNPUBLISHED
December 20, 2002

No. 228571
Ottawa Circuit Court
LC No. 97-029291-DM

Before: Jansen, P.J. and Smolenski and Wilder, JJ.

PER CURIAM.

Defendant and intervenor appeal the trial court's order denying their motion to compel payment of equitable mortgage from closing escrow. We reverse.

I. Facts

Plaintiff filed this action of divorce in 1997. The parties agreed to terms of the divorce, and a settlement was placed on the record in April 1999. The judgment of divorce, which incorporates the terms of the settlement and was not entered until June 28, 1999, provides in part that the proceeds of the sale of the marital home shall be divided equally by plaintiff and defendant. At the time the settlement was placed on the record mortgage payments on the marital home were several months in arrears. Shortly thereafter, plaintiff and defendant received notice from the bank that the mortgage was in foreclosure and that a mortgage foreclosure sale was scheduled for May 20, 1999. Defendant sought intervenor's assistance (intervenor is defendant's father) in preventing the foreclosure sale.

Intervenor agreed to provide the funds and to make such direct payments as were necessary to cancel the foreclosure sale, thereby preserving the parties' respective equity in the marital home. In exchange, defendant agreed that when the home was sold, intervenor would be reimbursed from the sale proceeds. Thereafter, on May 9, 1999 intervenor made payments totaling $173,251.33 to the mortgage company and the law firm handling the foreclosure

proceedings, and the foreclosure proceedings were cancelled. Intervenor then alerted plaintiff that he had paid the mortgage, that the foreclosure sale had been cancelled, and that intervenor sought reimbursement of these funds, jointly from plaintiff and defendant, from the proceeds of the sale of the marital home. Plaintiff, who had had no prior discussions with intervenor concerning reimbursement, refused to sign a promissory note agreeing to reimburse intervenor. On November 24, 1999, intervenor filed an equitable mortgage with the Ottawa County Register of Deeds. Subsequently, the marital home was sold for $289,000, and these proceeds have been held in escrow during the pendency of these proceedings.

Intervenor filed a motion to intervene in the divorce action, which the trial court granted. The trial court then entertained arguments from the parties regarding the proper disposition of the proceeds from the sale of the marital home. Plaintiff asserted that because he did not solicit intervenor's assistance and had no agreement to reimburse intervenor for his payment of the mortgage, intervenor's actions amounted to a gift to plaintiff that plaintiff had no obligation to repay. Defendant and intervenor contended that the doctrine of equitable subrogation applies to these facts, and that intervenor's equitable mortgage on the property should be enforced to require plaintiff to share in intervenor's reimbursement..

The trial court denied the relief sought by defendant and intervenor, reasoning that the doctrine of equitable subrogation did not apply because

> [intervenor] did not pay the parties' mortgage at the behest of [plaintiff], nor did he even discuss his intentions to make the payment with [plaintiff]. Only after making the payment did [intervenor] seek an agreement from [plaintiff] to repay. The case law is clear that subrogation is not available to mere volunteers.

The trial court further concluded that the motion to compel payment should be denied because "[t]he Michigan Supreme Court has made clear that an agreement or intent to repay must be established before the court can impose an equitable lien".

Defendant's and intervenor's motion for reconsideration on this issue was denied, and this appeal ensued.

II. Standard of Review

We review de novo an equitable determination reached by the trial court. *Forest City Enterprises, Inc v Leemon Oil Co*, 228 Mich App 57, 67; 577 NW2d 150 (1998). The trial court's findings of fact to support the equitable determination are reviewed for clear error. *Id*.

III. Analysis

In *Hartford Accident & Indemnity Co v Used Car Factory, Inc*, 461 Mich 210, 215; 600 NW2d 630 (1999), our Supreme Court defined the doctrine of equitable subrogation as follows:

> Equitable subrogation is a legal fiction through which a person who pays a debt for which another is primarily responsible is substituted or subrogated to all the rights and remedies of the other. It is well-established that the subrogee acquires no greater rights than those possessed by the subrogor, and that the subrogee may

> not be a "mere volunteer." [Quoting *Commercial Union Ins Co v Medical Protective Co*, 426 Mich 109, 117; 393 NW2d 479 (1986) (opinion of Williams, C.J.) (citations omitted).]

The Court further noted that "[e]quitable subrogation is a flexible, elastic doctrine of equity" and that "its application should and must proceed on the case-by-case analysis characteristic of equity jurisprudence." *Hartford*, *supra*, 215.

Applying this doctrine to the dispute at hand, the trial court found that intervenor was a "mere volunteer" when he paid off the note and mortgage on the marital home, and that therefore equitable subrogation could not be applied to grant intervenor any right or remedy against plaintiff. We disagree, and hold that the trial court clearly erred in finding that intervenor was a "mere volunteer".

Equitable relief in favor of defendant and intervenor is compelled by *Smith v Sprague*, 244 Mich 577, 578-581; 222 NW 207 (1928). In *Smith*, the plaintiff was divorced from the son of the defendant and her husband (Mr. Sprague), but had remained friendly with her former in-laws. Mr. Sprague requested from plaintiff loans totaling $9,500 in order to satisfy mortgage debt, which was due and soon to be foreclosed, on a parcel of land owed by defendant and Mr. Sprague as tenants by the entireties. *Id.* at 578. In consideration of the loans, Mr. Sprague promised to grant plaintiff a mortgage for the debts and he did in fact deliver demand notes to her for the amounts due. *Id.* However, he died without paying the notes or providing security for them, and defendant neither made the same promise nor ratified the promises made by her husband. *Id.* at 579. The plaintiff sought subrogation to the rights of the mortgagees on the real property owned by the defendant and the Supreme Court granted relief. In finding for plaintiff, the court held:

> . . . While the evidence is capable of the fair inference that Mr. Sprague was authorized to act and did act for both himself and [the defendant], *the matter is not necessary to decision*. We are not here enforcing a contract. Subrogation does not depend upon contract. It is an equitable principle.
>
> It is no longer narrow and technical in its scope, but has been broadened and extended to cover particular facts and circumstances, where it is equitable that a person furnishing money to pay a debt should be substituted for the creditor or in place of the creditor. It has been called the mode which equity adopts to compel the ultimate payment of a debt by one who in justice, equity, and good conscience ought to pay it.
>
> "It is proper in all cases to allow it where injustice would follow its denial." It will not be allowed to a mere stranger or volunteer.
>
> *The purpose served by the evidence that plaintiff paid the money to satisfy the mortgage at the instance, promise, and request of Mr. Sprague, one of the tenants by the entireties, is that it shows that plaintiff was not a mere volunteer. And it is a sufficient showing.*

> It was not necessary to go further and show that Mrs. Sprague, the defendant, also made like promise and request. An illustrative case is *Simonson v Lauck*, 93 N.Y. Supp. 965. There one, at the request of one of four tenants in common and for his benefit, tendered to the mortgagee the full amount due under the mortgage and requested an assignment, stating that he was acting at the tenants request, and it was held that he was not a mere volunteer to whom right of subrogation should be denied.
>
> Another case is *Ogden v Totten*, 17 Ky. Law Rep. 1390 (34 S.W. 1081). There the holders of a purchase-money lien and a mortgage lien on a homestead, after the death of the husband, threatened to sell the property, and the widow who owned but a life interest, procured one to take up the lien debts, and he was held entitled to subrogation.
>
> . . .
>
> Defendant here had benefit equal to that received by her husband from plaintiff's money used to satisfy the mortgage debt. The trial court was right in granting subrogation. [*Id.* at 579-581 (citation omitted)(emphasis added).]

Here, as in *Smith*, because intervenor acted at the request of defendant, intervenor was not a mere volunteer. Moreover, plaintiff realized a benefit equal to the benefit received by defendant because of intervenor's action to satisfy the note and cancel the foreclosure proceeding. Accordingly, equitable subrogation, as "the mode which equity adopts to compel the ultimate payment of a debt by one who in justice, equity, and good conscience ought to pay it," is applicable to these facts.

For the foregoing reasons, we reverse the trial court's order denying defendant's and intervenor's motion to compel equitable mortgage from the closing escrow, and remand for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Michael R. Smolenski
/s/ Kurtis T. Wilder