STATE OF MICHIGAN

COURT OF APPEALS

KEYBANK NATIONAL ASSOCIATION, Plaintiff-Appellee,	UNPUBLISHED May 11, 2004
v	No. 242925 Washtenaw Circuit Court
AMERIQUEST MORTGAGE COMPANY, Defendant-Appellant.	LC No. 01-001307-CZ

Before: Sawyer, P.J., and Griffin and Smolenski, JJ.

PER CURIAM.

Defendant appeals as of right from the trial court's order granting plaintiff's motion for summary disposition and denying defendant's motion for summary disposition. We affirm.

I

The instant case arises out of plaintiff's action to quiet title. On October 30, 1989, Anthony and Susan Didonato gave a mortgage to Trustcorp Bank on property located at 5950 Willowbridge in Ypsilanti; the mortgage was recorded on November 6, 1989. On August 6, 1997, Trustcorp assigned the mortgage to Nationsbanc Mortgage Corporation (hereinafter Nationsbanc); the assignment was recorded on August 25, 1997. On November 4, 1997, the Didonatos gave a second mortgage to plaintiff Keybank National Association for $28,800; the mortgage was recorded on November 20, 1997. Thereafter, the Didonatos defaulted on the mortgage to Nationsbanc and Nationsbanc foreclosed on the mortgage by a sale of the mortgaged premises on December 17, 1998. Nationsbanc was the high bidder at the foreclosure sale, bidding $92,534.99. Pursuant to MCL 600.3240(8), the six-month statutory redemption expired on June 18, 1999.

The Didonatos applied for a loan on their property from defendant Ameriquest Mortgage Company (Ameriquest), for the purpose of redeeming their home from foreclosure. Nationsbanc and the Didonatos agreed to extend the redemption period until July 7, 1999. On July 2, 1999, Ameriquest loaned the Didonatos $90,000, purportedly based on the premise that the loan would be secured by a first mortgage on the same property; the mortgage was recorded on July 29, 1999. The loan enabled the Didonatos to redeem the property on which Nationsbanc had foreclosed at the December 17, 1998, sheriff's sale.

For reasons unknown, plaintiff's mortgage did not appear on the mortgage title insurance commitment to Ameriquest issued by a title company, although the KeyBank mortgage remained of record and had not been satisfied.[1] It is undisputed that plaintiff was not contacted by the Didonatos or Ameriquest, through its representatives, regarding the proposed redemption of the Nationsbanc mortgage for the purpose of seeking consent or subordination.

The Didonatos defaulted on plaintiff's mortgage, and on April 25, 2000, plaintiff filed a notice of levy against the Didonatos. In September 2000, plaintiff discovered that the Nationsbanc mortgage had been redeemed. Defendant thereafter filed a notice of claim of interest in real property. In May 2001, plaintiff commenced foreclosure by advertisement of its mortgage against the property, but in light of the apparent dispute with defendant Ameriquest regarding the priority of its mortgage lien, the foreclosure was canceled and plaintiff filed the present action to quiet title and determine the relative priority of the mortgage interests of the parties. Plaintiff alleged that its mortgage had priority over defendant's mortgage, because it was recorded first in time, and that defendant's interest in the property was subject to and subordinate to plaintiff's interest.

Defendant answered plaintiff's complaint, contending that its interest had priority over, and was superior to, any interest claimed by plaintiff in the property. Defendant maintained that the statutory redemption period expired on June 18, 1998, before the property was redeemed from the mortgage foreclosure sale, causing plaintiff's second and junior mortgage to be extinguished pursuant to MCL 600.3236. Defendant further claimed that if plaintiff's mortgage was not extinguished by the foreclosure of the prior mortgage of the Didonatos by Nationsbanc on December 17, 1998, and expiration without redemption on June 17, 1999, plaintiff's mortgage was nonetheless subordinate and junior to defendant's mortgage in light of the payoff and discharge of the prior mortgage after foreclosure by Nationsbanc by virtue of the loan proceeds from defendant to the Didonatos for $90,000; defendant was therefore entitled to the rights, priority, and interest of Nationsbanc. Alternatively, defendant argued that it was entitled to an equitable lien or constructive trust on the property to the extent that the proceeds of the loan secured by its mortgage went to redeem the property from foreclosure. Finally, defendant claimed that its mortgage had priority over the notice of levy by plaintiff because it was recorded earlier in time.

Plaintiff moved for summary disposition pursuant to MCR 2.116(C)(9) and (10), and defendant answered plaintiff's motion for summary disposition and moved for summary disposition pursuant to MCR 2.116(I)(2), reiterating its argument that its mortgage was a valid first lien, with priority over plaintiff's second mortgage.

Following argument on the parties' motions, the trial court issued an opinion and order granting plaintiff's motion for summary disposition and denying defendant's similar motion. The trial court determined that the redemption period was properly extended by the agreement of

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[1] At the time of redemption, the total indebtedness of the Didonatos to KeyBank exceeded $38,000, and that indebtedness is currently in the amount of approximately $52,000, including interest and collection costs.

the parties, and that it did not matter that the extension occurred after the expiration of the redemption period, because the agreement was reached without consequence to the mortgagee or any of the mortgagors. The trial court found that plaintiff's lien was not extinguished, and that because defendant had constructive notice of plaintiff's lien, plaintiff's lien had first priority. Defendant now appeals as of right.

II

This Court reviews rulings on motions for summary disposition de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). An action to quiet title is equitable in nature and is reviewed by this Court de novo. *Ingle v Musgrave*, 159 Mich App 356, 361; 406 NW2d 492 (1987).

Plaintiff's motion for summary disposition was brought pursuant to MCR 2.116(C)(9) and (10). "A motion brought under MCR 2.116(C)(9) seeks a determination whether the opposing party has failed to state a valid defense to the claim asserted against it. Only the pleadings may be considered when the motion is brought under MCR 2.116(C)(9). MCR 2.116(G)(5). The well-pleaded allegations are accepted as true, and the test is whether the defendant's defenses are so clearly untenable as a matter of law that no factual development could possibly deny a plaintiff's right to recovery." *Nicita v Detroit (After Remand)*, 216 Mich App 746, 750; 550 NW2d 269 (1996), citing *Lepp v Cheboygan Area Schools*, 190 Mich App 726, 730; 476 NW2d 506 (1991).

"A motion brought under MCR 2.116(C)(10) tests the factual basis of a plaintiff's claim." *Nicita, supra* at 750, citing *Skinner v Square D Co*, 445 Mich 153, 161; 516 NW2d 475 (1994). Our Supreme Court has held that a trial court "may grant a motion for summary disposition under MCR 2.116(C)(10) if the affidavits or other documentary evidence show that there is no genuine issue in respect to any material fact, and the moving party is entitled to judgment as a matter of law." *Smith v Globe Life Ins Co*, 460 Mich 446, 454-455; 597 NW2d 28 (1999), quoting *Quinto v Cross & Peters Co*, 451 Mich 358, 362-363; 547 NW2d 314 (1996). "In reviewing a motion for summary disposition brought under MCR 2.116(C)(10), a trial court considers affidavits, pleadings, depositions, admissions, and documentary evidence filed in the action or submitted by the parties . . . in the light most favorable to the party opposing the motion." *Id.* at 454, quoting *Quinto, supra* at 362-363.

Defendant's motion for summary disposition was brought pursuant to MCR 2.116(I)(2), where, "if it appears to the court that the opposing party, rather than the moving party, is entitled to judgment, the court may render judgment in favor of the opposing party." *Sharper Image Corp v Dep't of Treasury*, 216 Mich App 698, 701; 550 NW2d 596 (1996).

On appeal, defendant argues that the trial court erred in granting plaintiff's motion for summary disposition and denying its similar motion. Defendant contends that plaintiff's mortgage was extinguished as a matter of law when the statutory redemption period expired; that if not already extinguished, plaintiff was not entitled to any benefit from Nationbanc's agreement to extend the redemption period after it expired; that even if plaintiff is entitled to benefit from the extension of the redemption period (by retaining its interest), plaintiff cannot repudiate the portion of the agreement which made defendant's loan contingent on receiving first lien priority;

and that defendant is entitled to Nationbanc's first lien holder rights under the doctrine of equitable subrogation.

As previously noted, the foreclosure sale occurred on December 17, 1998; therefore, the six-month statutory redemption period expired on June 18, 1999, pursuant to MCL 600.3240(8). The Didonatos owed $85,030.76 on the Nationsbanc mortgage, and the evidence of sale indicated that the sheriff's deed "will become operative at the expiration of 6 months from the date of such sale." MCL 600.3236 provides in pertinent part:

> Unless the premises described in such deed shall be redeemed within the time limited for such redemption as hereinafter provided, such deed shall thereupon become operative, and shall vest in the grantee therein named, his heirs or assigns, all the right, title, and interest which the mortgagor had at the time of the execution of the mortgage, or at any time thereafter, except as to any parcel or parcels which may have been redeemed and canceled, as hereinafter provided; and the record thereof shall thereafter, for all purposes be deemed a valid record of said deed without being re-recorded, but no person having any valid subsisting lien upon the mortgaged premises, or any part thereof, created before the lien of such mortgage took effect, shall be prejudiced by any such sale, nor shall his rights or interests be in any way affected thereby.

Thus, in the instant case, when the statutory redemption period expired, Nationsbanc's sheriff's deed presumably should have become operative, and title to the property should have vested in Nationsbanc. See MCL 600.3240; *Bankers Trust Co of Detroit v Rose*, 322 Mich 256, 260; 33 NW2d 783 (1948), quoting *McCreery v Roff,* 198 Mich 558, 564; 155 NW 517 (1915) ("Legal title does not vest at once upon the auction sale on statutory foreclosure. . . but only at the expiration of the period allowed for redemption"); *Detroit Fidelity & Surety Co v Donaldson*, 255 Mich 129; 237 NW 380 (1931) (mortgagor does not lose all interest in property until time for redemption under the foreclosure decree expires); *Dunitz v Woodford Apartments Co*, 236 Mich 45, 49; 209 NW 809 (1926).

However, the execution creditor may validly contract to waive or extend the statutory period of redemption:

> The time provided by statute for redemption from foreclosure sale may be extended by agreement of the parties. Thus, the time for redemption from a mortgage foreclosure sale may be extended by agreement of the purchaser, in which case the ownership of the property does not change until expiration of the extended period. So, also, if a mortgagee enters into a valid agreement with the mortgagor prior to the expiration of the statutory period of redemption, which in effect extends the right of payment of the mortgage debt beyond the redemption period, he abandons rights acquired as a purchaser of the mortgaged property on foreclosure of the mortgage, and in legal effect continues the relation of mortgagor and mortgagee between himself and his debtor. The extension may be by verbal agreement, provided it is made before the expiration of the redemption period; if it is made after that time it is frequently held to be within the statute of frauds. Apart from consideration of the statute of frauds, the agreement to permit redemption or to extend the time of redemption has been upheld upon the grounds

> of general equitable relief, the most frequent of which is found in the application of the principles of estoppel.
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> The right to redeem from a sale on foreclosure of a mortgage after the redemption period has expired, under a claim of relying on a promise by the mortgagee to accept payment at some future time, will not be upheld unless it appears by clear and convincing evidence that the promise was made and the redemptioner relied on it in good faith. The rule appears to be that an extension of a redemption period which is obtained by one person may not be taken advantage of by another. [55 Am Jur 2d, Mortgages, § 907]

See also 59A CJS, Mortgages, § 1038 ("The parties may by contract extend the period allowed by law for redemption, whether the agreement is made pending the time for redemption or after it has expired"). Cf. *Macklem v Warren Construction Co*, 343 Mich 334, 339; 72 NW2d 60 (1955); *Thomas v Ledger*, 274 Mich 16; 263 NW 783 (1935); *Pellston Planing Mill & Lumber Co v Van Wormer*, 198 Mich 648, 653; 165 NW 724 (1917) ("The authorities are numerous, and we think substantially uniform, that the execution creditor and the execution debtor may bind themselves by an agreement to extend the time for redemption . . . ."); *Audretsch v Hurst*, 126 Mich 301, 302-303; 85 NW 746 (1901).

Here, it is undisputed that the redemption period was extended by agreement of the parties to the Nationsbanc mortgage, albeit after the statutory redemption period had expired. The Didonatos applied for a loan on their property from defendant Ameriquest for the purpose of redeeming or their property from foreclosure. A request to extend the redemption period was made by Ameriquest on June 18, 1999, and confirmed in writing by telefax on June 21, 1999. Representatives of Nationsbanc communicated an acceptance of that offer verbally to the Didonatos on June 25, 1999, and in writing to Ameriquest by telefax on July 1, 1999. On July 1, 1999, Nationsbanc and the Didonatos agreed to extend the redemption period until July 7, 1999. On July 2, 1999, defendant loaned the Didonatos the funds to redeem to avoid foreclosure, in exchange for a mortgage on the property. Clearly, all parties in immediate interest assumed, understood and proceeded on the basis that the redemption period had not expired. The agreement and intent to extend was unequivocally manifested in all of the documents and actions by the Didonatos as mortgagor and Nationsbanc as mortgagee as well as defendant Ameriquest itself. In effect, "[w]here a purchaser at a foreclosure sale agrees with the equity owner to extend his time for redemption beyond the statutory period, it is obvious that the parties do not intend that the formalities of a statutory redemption are to be observed." *Doner v Phoenix Joint Stock Land Bank of Kansas City*, 381 Ill 106; 45 NE 2d 20, 25 (Ill, 1942).

Consequently, under the present circumstances, we agree with the trial court's assessment that "[t]he agreement [to extend the redemption period] was reached without consequence to the mortgagee or any of the mortgagors," and when the Didonatos redeemed within the extended time period, and Nationsbanc's interest was satisfied, plaintiff, holder of a second mortgage on the property, moved into the position of first priority lien holder by virtue of the Michigan Real Property Recording Act, MCL 565.1 *et seq*., Michigan's "race-notice" statute. *Piech v Beaty*, 298 Mich 535, 537-538; 299 NW 705 (1941). Plaintiff's mortgage was recorded in November 1997, almost two years before defendant recorded its mortgage on the same property.

In Michigan, interests in real property are recorded with the register of deeds in the county where the property is located. All recorded liens, rights, and interests in property take priority over subsequent owners and encumbrances:

> (4) The instrument shall be considered as recorded at the time so noted and shall be notice to all persons except the recorded land owner subject to subsection (2), of the liens, rights, and interests acquired by or involved in the proceedings. *All subsequent owners or encumbrancers shall be subject to the perfected liens, rights or interests.* [MCL 565.25(4),(emphasis added)].

Because Michigan is a recording priority jurisdiction, "[m]ortgages are subjected to the satisfaction of the obligation on the mortgage note in the order in which they are recorded." *Mitchell v United States Mutual Real Estate Investment Trust*, 144 Mich App 302, 314; 375 NW2d 424 (1985). Recording of a mortgage constitutes constructive notice to all subsequent lien holders regarding the existence of the mortgage and amount of indebtedness secured thereby. *McMurtry v Smith*, 320 Mich 304, 306; 30 NW2d 880 (1948); *Sinclair v Slawson*, 44 Mich 123; 6 NW 207 (1880); *Lewis v Hook*, 18 Mich App 405, 408; 171 NW2d 221 (1969). The mandate of the above statute is clear: recording of a mortgage charges third parties with constructive notice and determines the priority of the lien. A duly recorded mortgage is notice to all subsequent purchasers that they take subject to any lien the mortgage may have on the land whether the record is examined or not. *Piech*, *supra* at 538; *Barnard v Campau*, 29 Mich 162 (1874). In the instant case, the fact the defendant's mortgage title insurance commitment inexplicably failed to evidence the properly recorded KeyBank mortgage does not nullify the constructive notice supplied by recordation or alter the priority status of plaintiff's mortgage. Cf. *Lewis*, *supra* at 409.

Defendant concedes that it had constructive knowledge of plaintiff's lien because the mortgage was recorded, but nonetheless argues that its mortgage is entitled to priority over plaintiff's mortgage based on principles of equity. Defendant claims that pursuant to the doctrine of equitable subrogation, it is entitled to the rights of the prior mortgagee, Nationsbanc, because its loan enabled the Didonatos to redeem the mortgage on which Nationsbanc had foreclosed. Our Supreme Court has noted that "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." *Commercial Union Ins Co v Medical Protective Co*, 426 Mich 109, 117; 393 NW2d 479 (1986), citing *Smith v Sprague*, 244 Mich 577, 579-580; 222 NW 207 (1928), and *Foremost Life Ins Co v Waters*, 88 Mich App 599, 603; 278 NW2d 688 (1979), rev'd on other grounds 415 Mich 303; 329 NW2d 688 (1982). Pursuant to this doctrine, the subrogee acquires no greater rights than those possessed by the subrogor, and the subrogee may not be a "mere volunteer." *Hartford Accident & Indemnity Co v Used Car Factory, Inc*, 461 Mich 210, 215; 600 NW2d 630 (1999); *Lentz v Stoflet*, 280 Mich 446, 449-450; 273 NW 763 (1937). In order to be entitled to subrogation, the subrogee must not have voluntarily made payment, but must have done so as consequence of his or her fulfillment of a legal or equitable duty owed to the subrogor. *Beaty v Hertzberg & Golden*, 456 Mich 247, 254-255, 258; 571 NW2d 716 (1997). "Equitable subrogation is a flexible, elastic doctrine of equity" and "its application should and must proceed on the case-by-case analysis characteristic of equity jurisprudence." *Id*. at 215. However, *equitable subrogation "will not be enforced where it will work an injustice to the rights of those having equal equities." Bd of Co Rd Comm'rs of*

Calhoun Co v Southern Surety Co, 216 Mich 528, 533; 185 NW 755 (1921) (citation omitted; emphasis added).

In the instant case, we agree with the trial court that there are no circumstances or conditions in this case which warrant the application of equitable principles enabling Ameriquest to circumvent the race-notice statute in order to "leap frog" the prior recorded lien of the KeyBank mortgage. Defendant had no preexisting interest in the property and was neither attempting to continue protection of that interest in the property, nor revive or obtain an assignment of the original first mortgage. Compare *Schanite v Plymouth United Savings Bank*, 277 Mich 33; 268 NW 801 (1937). Further, there is nothing in the record indicating that defendant was mislead or in any way adversely affected by any representations of plaintiff; indeed, plaintiff had no communication from Ameriquest prior to funding the Ameriquest mortgage and was unaware of the mortgage transaction between defendant and the Didonatos. The harsh reality is that defendant entered into the mortgage arrangement with the Didonatos, assuming that it could obtain first lien priority, without properly searching the record, so that a mortgage that had been of record since 1997, well before the execution of defendant's mortgage, went unnoticed. Under circumstances where defendant is charged with constructive knowledge of plaintiff's earlier recorded mortgage, and because defendant inexplicably failed to discover plaintiff's properly recorded prior lien, we conclude that defendant is not entitled to equitable subrogation, and therefore, trial court did not err in granting plaintiff's summary disposition motion and denying defendant's similar motion.

III

Defendant next argues that the trial court abused its discretion in permitting plaintiff to attach the commitment for title insurance in support of its motion for summary disposition. We disagree.

To preserve an evidentiary issue for review, a party opposing the admission of evidence must object at trial and specify the same ground for objection which it asserts on appeal. MRE 103(a)(1). *Kubisz v Cadillac Gage Textron, Inc*, 236 Mich App 629, 637; 601 NW2d 160 (1999). Defendant failed to object to the admission of the evidence below; therefore, the issue is unpreserved. This Court reviews unpreserved evidentiary issues to determine whether there was plain error affecting a party's substantial rights. *Hilgendorf v St John Hosp & Medical Center Corp*, 245 Mich App 670, 700; 630 NW2d 356 (2001).

The trial court did not err in considering the commitment for title insurance provided by plaintiff in ruling on the parties' motions for summary disposition. In the instant case, plaintiff requested the commitment for title insurance during the course of discovery. Defendant concedes that plaintiff's discovery request was proper, pursuant to MCR 2.302(B)(2) concerning insurance agreements:

> A party may obtain discovery of the existence and contents of an insurance agreement under which a person carrying on an insurance business may be liable to satisfy part or all of a judgment which may be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment. Information concerning the insurance agreement is not by reason of disclosure

admissible at trial. For purposes of this subrule, an application for insurance is not part of an insurance agreement.

Defendant argues that plaintiff, "in providing the evidence of title insurance to the Circuit Court clearly ignored the portion of that Court Rule that expressly provides that 'Information concerning the insurance agreement is not by reason of disclosure admissible at Trial.' MCR 2.301(B)(2)." However, the instant case concerns the trial court's ruling on a motion for summary disposition brought under MCR 2.116(C)(10), wherein "a trial court considers affidavits, pleadings, depositions, admissions, and documentary evidence filed in the action or submitted by the parties . . . in the light most favorable to the party opposing the motion." *Smith, supra* at 454, quoting *Quinto, supra* at 362-363.

The record reveals that plaintiff properly filed the commitment for title insurance pursuant to MCR 2.302(H)(1)(a), which provides in pertinent part:

> (H) Filing and Service of Discovery Materials
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> (1) Unless a particular rule requires filing of discovery materials, requests, responses, depositions, and other discovery materials may not be filed with the court except as follows:
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> (a) If discovery materials are to be used in connection with a motion, they must either be filed separately or be attached to the motion or an accompanying affidavit.

Consequently, there has been no plain error affecting defendant's substantial rights, and defendant is not entitled to relief on such grounds. *Hilgendorf, supra*.

Affirmed.

/s/ David H. Sawyer
/s/ Richard Allen Griffin
/s/ Michael R. Smolenski