

STATE OF MICHIGAN
COURT OF APPEALS

WASHINGTON MUTUAL BANK,

Plaintiff-Appellee,

v

COMMUNITY SHORES BANK,

Defendant-Appellant,

and

STANDARD FEDERAL BANK,

Defendant.

UNPUBLISHED

October 25, 2007

No. 274959

Genesee Circuit Court

LC No. 05-081560-CK

Before: Owens, P.J., and Bandstra and Davis, JJ.

PER CURIAM.

Defendant Community Shores Bank appeals as of right from a circuit court order granting plaintiff's motion for summary disposition. We reverse. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

This case involves a question of priority of mortgages issued to Washington Mutual Bank ("plaintiff") and Community Shores Bank ("defendant") by Christopher and Jane Turton. The Turtons had previously issued one mortgage to The Mortgage Company of Michigan, which assigned that mortgage to Flagstar Bank; the Turtons had issued another mortgage to D & N Bank, which later merged into Republic Bank. In March 2001, the Turtons obtained from defendant a short-term, unsecured loan that was to be refinanced into a mortgage on the Turtons' personal residence at some point in the future. In October 2001, the Turtons refinanced their existing mortgages with a loan from plaintiff. Plaintiff paid both Flagstar and Republic but neglected to record its mortgage. In March 2002, the Turtons' unsecured loan was converted into a loan secured in part by a mortgage, and defendant recorded its mortgage that same month. In January 2003, the Turtons executed a mortgage in favor of Standard Federal Bank, and that mortgage was recorded on February 6, 2003.

The Turtons defaulted on defendant's loan, and in June 2004 defendant initiated foreclosure proceedings. It was only during the pendency of those proceedings that plaintiff discovered that the October 2001 mortgage had been lost without being recorded, and a copy was

recorded in October 2004. A foreclosure sale was held, at which defendant was the successful bidder. In June 2005, plaintiff filed the instant action to determine whose mortgage took priority. Plaintiff settled with Standard Federal Bank. Defendant contended that it recorded its mortgage first and without knowledge of plaintiff's mortgage; plaintiff contended that defendant knew it was in a second position to a senior mortgage and that plaintiff was entitled to seniority under the doctrine of equitable subrogation. The trial court found in favor of plaintiff on the ground that defendant had not followed "normal banking procedures" in making its loan to the Turtons.

The trial court's ruling on a motion for summary disposition is reviewed de novo. *Kefgen v Davidson*, 241 Mich App 611, 616; 617 NW2d 351 (2000). Statutory interpretation is a question of law that is reviewed de novo on appeal. *Van Reken v Darden, Neef & Heitsch*, 259 Mich App 454, 456; 674 NW2d 731 (2003). "Actions to quiet title are equitable; therefore, the trial court's holdings are reviewed de novo." *Killips v Mannisto*, 244 Mich App 256, 258; 624 NW2d 224 (2001).

"Michigan is a race-notice state . . . , and owners of interests in land can protect their interests by properly recording those interests." *Lakeside Assoc v Toski Sands*, 131 Mich App 292, 298; 346 NW2d 92 (1983). A recorded instrument, such as a deed or mortgage, is considered "notice to all persons except the recorded landowner . . . of the liens, rights, and interests acquired by or involved in the proceedings. All subsequent owners or encumbrances shall take subject to the perfected liens, rights, or interests." MCL 565.25(4). A conveyance of real estate that is not recorded "shall be void as against any subsequent purchaser in good faith and for a valuable consideration, of the same real estate or any portion thereof, whose conveyance shall be first duly recorded." MCL 565.29. A conveyance includes a mortgage. MCL 565.35. A purchaser is a "person to whom any estate or interest in real estate, shall be conveyed for a valuable consideration" MCL 565.34.

Although plaintiff's mortgage was made first, defendant's mortgage was recorded first. Therefore, defendant's mortgage takes priority if defendant is a good-faith purchaser who paid valuable consideration. There is no dispute that defendant is a purchaser who paid valuable consideration, so the only question is whether defendant is a purchaser in good faith. "A good-faith purchaser is one who purchases without notice of a defect in the vendor's title." *Michigan Nat'l Bank & Trust Co v Morren*, 194 Mich App 407, 410; 487 NW2d 784 (1992). Notice can be actual or constructive. *Kastle v Clemons*, 330 Mich 28, 31; 46 NW2d 450 (1951).

Defendant did not have actual notice of plaintiff's mortgage, which was not recorded and not disclosed by the Turtons. The Turtons only advised defendant's loan officer that they had an existing mortgage on which they owed \$50,000 to \$60,000. Defendant sought a title commitment, which disclosed only The Mortgage Company's mortgage. We do not believe that knowledge of *a* mortgage recorded on a piece of property, without more, can constitute notice of any *other* mortgages on that piece of property without eviscerating the race-notice statute. Therefore, the only remaining question is whether defendant had constructive notice of plaintiff's mortgage.

Constructive notice exists "[w]hen a person has knowledge of such facts as would lead any honest man, using ordinary caution, to make further inquiries concerning the possible rights of another in real estate, and fails to make" such inquiries. *Kastle, supra* at 31. The relevant issues are whether the facts were sufficient to give rise to the need to make further inquiry and,

if so, whether due diligence was exercised in making the inquiry. *American Fed S&L Ass'n v Orenstein*, 81 Mich App 249, 252; 265 NW2d 111 (1978). The open, manifest, unequivocal possession of premises by a person constitutes constructive notice of that person's possible interests in the property. *Kastle, supra* at 31. Where the purchaser's agent has information concerning the possible interest of another, the purchaser is charged with constructive notice of the same information, *id.* at 32, unless the agent's interest is adverse to that of the purchaser. *Bryce v Jones*, 54 Mich App 709, 715-716; 221 NW2d 433 (1974), rev'd on other grounds 394 Mich 425 (1975). The purchaser is deemed to have constructive notice of "all matters properly of record," *Richards v Tibaldi*, 272 Mich App 522, 540; 726 NW2d 770 (2006), such as a lis pendens, *Dassance v Nienhuis*, 57 Mich App 422, 432; 225 NW2d 789 (1975), and any interests appearing in the chain of title. *Houseman v Gerken*, 231 Mich 253, 255; 203 NW 841 (1925).

In this case, the trial court considered whether defendant exercised due diligence in making its inquiry without ever finding that it was aware of any facts to indicate that further inquiry was needed. This reasoning is backward: the fact that defendant could have undertaken investigation that would have revealed plaintiff's interest is irrelevant if there were no facts that would make a reasonably prudent person aware that such an investigation was warranted. The Turtons disclosed the existence of a prior mortgage and estimated how much was owed thereon, but they apparently did not disclose the holder of the mortgage. Defendant made a reasonable inquiry by securing a title commitment, which revealed the existence of The Mortgage Company's mortgage. There are no facts in the record to suggest that defendant should have been aware of plaintiff's additional mortgage. It was not recorded, there is no indication that it was referenced in any other recorded instruments in the chain of title or disclosed to an agent of defendant, and plaintiff was not in possession of the property. Defendant had no basis for suspecting that anyone other than The Mortgage Company had an interest in the property, so defendant cannot be said to have had constructive notice of plaintiff's interest. Therefore, defendant was a good faith purchaser and its mortgage is entitled to priority over plaintiff's subsequently recorded mortgage.

Plaintiff's alternative argument is that its mortgage is entitled to priority on the basis of the doctrine of equitable subrogation, under which a mortgagee whose loan is used to discharge a prior mortgage would theoretically be entitled to assert the priority rights of the prior mortgagee. *Ameriquist Mortgage Co v Alton*, 273 Mich App 84, 94; 731 NW2d 99 (2006). However, Michigan's race-notice recording statute is the basis for determining priority of liens, and courts' equitable powers cannot be used to circumvent the statute in the absence of "unusual circumstances" like a preexisting interest in the property, fraud, or mutual mistake. *Id.*, 94-100. None of the distinctions plaintiff seeks to draw avoid the fact that the holder of a later-recorded mortgage is attempting to take priority over an earlier-recorded mortgage contrary to the unambiguous terms of the race-notice statute. Therefore, plaintiff cannot use the doctrine of equitable subrogation to obtain priority over defendant's mortgage.

Reversed and remanded for entry of an order granting defendant's motion for summary disposition. Jurisdiction is not retained.

/s/ Donald S. Owens
/s/ Richard A. Bandstra
/s/ Alton T. Davis