STATE OF MICHIGAN

COURT OF APPEALS

MORTGAGE ELECTRONIC REGISTRATION SYSTEMS and FLAGSTAR BANK, FSB, Plaintiffs-Appellants,	UNPUBLISHED July 1, 2008
v	No. 275856 Otsego Circuit Court
NORTHWESTERN BANK, RANDY BURROUGHS, and LESLIE BURROUGHS, Defendants-Appellees.	LC No. 05-011204-CH

Before: Bandstra, P.J., and Talbot and Schuette, JJ.

PER CURIAM.

Plaintiffs appeal as of right the trial court's orders granting summary disposition to defendant Northwestern Bank ("Northwestern") on plaintiffs' claims for relief under separate theories of marshaling of assets and equitable subrogation.[1] We affirm.

Defendants Randy and Leslie Burroughs obtained a residential mortgage from Northwestern; at the same time, Northwestern placed a second lien on the Burroughs' residential property as security for a commercial loan, which was also secured by a mortgage on a separate "lake lot" owned by the Burroughs. The Burroughs refinanced their residential mortgage with plaintiff Flagstar Bank, which paid off Northwestern's residential mortgage. At the time, Flagstar was aware of Northwestern's second lien, but either assumed or was assured by its title company that Northwestern would execute a subordination agreement that would give the Flagstar mortgage priority over Northwestern's perfected second lien securing the commercial loan. However, Northwestern was never asked to sign a subordination agreement.

After the Burroughs defaulted on the Northwestern commercial loan, Northwestern foreclosed on its residential lien and discharged the mortgage on the lake lot. The Burroughs declared bankruptcy. More than a year and a half after the redemption period for the residential

[1] Although Flagstar Bank, FSB, and Mortgage Electronic Registration Systems, Inc. ("MERS"), are both party plaintiffs in this action, hereafter we refer only to plaintiff Flagstar Bank in this opinion because plaintiff MERS is solely a nominee party.

foreclosure expired, Flagstar brought this action alleging (1) that Northwestern had an obligation to marshal assets by proceeding against the lake lot instead of foreclosing on the residential property, and (2) that Flagstar was entitled to relief under a theory of equitable subrogation. In separate orders, the trial court determined that Northwestern was entitled to summary disposition with respect to each of Flagstar's claims.

This Court reviews the trial court's grant or denial of summary disposition de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). It appears that summary disposition was granted under MCR 2.116(C)(10). A motion for summary disposition pursuant to MCR 2.116(C)(10) tests the factual support for a claim. *MacDonald v PKT, Inc*, 464 Mich 322, 332; 628 NW2d 33 (2001). The trial court must consider any pleadings, affidavits, depositions, admissions, or other documentary evidence filed by the parties in a light most favorable to the nonmoving party to determine whether a genuine issue of fact exists. MCR 2.116(G)(2); *Ritchie-Gamester v City of Berkley*, 461 Mich 73, 76; 597 NW2d 517 (1999). The motion should be granted if the evidence demonstrates that no genuine issue of material fact exists, and that the moving party is entitled to judgment as a matter of law. *MacDonald, supra* at 332.

It is undisputed that Northwestern had a valid prior lien on the Burroughs' residential property securing the commercial loan, which was not discharged when the Burroughs obtained their residential mortgage from Flagstar. When a mortgage is recorded, "all subsequent owners or encumbrances shall take subject to the perfected liens, rights, or interests." MCL 565.25(4). Because there was no subordination agreement, Flagstar was a junior lienor with "an imperfect security." *Farwell v Bigelow*, 112 Mich 285, 290; 70 NW 579 (1897), quoting 3 Pom Eq Jur § 1414.

Nevertheless, Flagstar first argues that it is entitled to relief from the consequences of the foreclosure sale of the Burroughs' residential property under the doctrine of marshaling of assets. Flagstar contends that because Northwestern's loan was secured by liens on both the residential property and the lake lot, Northwestern was obligated to foreclose on the lake lot first, thereby protecting Flagstar's junior lien on the residential property. We disagree. Flagstar is not entitled to rely on the marshaling of assets doctrine because it failed to timely invoke this theory of relief.

As this Court explained, in *SCD Chemical Distributors, Inc v Maintenance Research Lab, Inc*, 191 Mich App 43, 46; 477 NW2d 434 (1991):

> [T]he equitable remedy of marshaling of assets exists for the benefit of persons who hold a subordinate secured claim in property; where a senior creditor has a lien against two funds or parcels and the junior lienor has a lien against only one of those properties, a court of equity may compel the former to satisfy its claim out of the property that is encumbered by only its lien. However, application of the doctrine is limited in that it will not be allowed if it cannot be invoked without prejudicing or injuring the rights of the senior creditor or where it would harm the interests of a third party.

The existence of two funds "which may be resorted to by the creditor" is "an essential precedent condition" to marshaling assets. *Id.*; *Webber v Webber*, 109 Mich 147, 152; 66 NW2d 960 (1896). "The rules must be taken with the modifications and exceptions that in their application

the paramount incumbrancer shall not be delayed or inconvenienced in the collection of his debt, for it would be unreasonable that he should suffer because some one else has taken imperfect security." *Farwell, supra.* A junior creditor's right to have a senior creditor's assets marshaled "does not exist as does a lien or a vested interest"; it is "merely a principle which is to be administered when it has been invoked." 53 Am Jur 2d, Marshaling Assets, § 10, p 14. "The junior creditor acquires the right to have the common debtor's assets marshaled by taking proper steps to have the doctrine enforced." *Id.* at § 10, pp 13-14. "The invocation of the doctrine of marshaling is thus dependent upon a seasonal assertion of right by the junior lienholder. By failing to raise the question of marshaling promptly, the right to invoke the doctrine may be waived, or lost through laches." *Id.* at §§ 10, 30, p 14, 33.

In the instant case, Northwestern foreclosed its lien by advertisement. Flagstar does not allege that the foreclosure sale was invalid for failure to comply with any statutory requirements, and Flagstar was "not entitled to any greater notice than that required by the statute involved." *Cheff v Edwards,* 203 Mich App 557, 560; 513 NW2d 439 (1994). Flagstar did not bring action to demand marshaling of assets until more than one and a half years after the foreclosure redemption period had expired. By that time, the residential property had been foreclosed, the lien to the lake lot had been discharged, and the Burroughs had filed for bankruptcy. Consequently, Northwestern no longer had a lien against two properties so as to permit marshaling of assets. Accordingly, the trial court did not err in dismissing Flagstar's claim for relief under a marshaling of assets theory.

Flagstar also asserts that the trial court improperly dismissed its claim for equitable subrogation. We disagree.

As our Supreme Court explained, in *Hartford Accident & Indemnity Co v Used Car Factory, Inc,* 461 Mich 210, 215; 600 NW2d 630 (1999):

> 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."

"To avoid being a volunteer, a subrogee must be acting to fulfill a legal or equitable duty." *Eller v Metro Industrial Contracting, Inc,* 261 Mich App 569, 574; 683 NW2d 242 (2004). "Subrogation from its very nature, never could have been intended for the relief of those who were in a condition in which they were at liberty to elect whether they would or would not be bound." *Washington Mut Bank, FA v Shorebank Corp,* 267 Mich App 111, 118; 703 NW2d 486 (2005) (citations and internal quotations omitted). Thus, "the doctrine of equitable subrogation does not allow a new mortgagee to take the priority of the older mortgagee merely because the proceeds of the new mortgage were used to pay off the indebtedness secured by the old mortgage." *Id.* at 119-120.

Here, Flagstar had no preexisting interest in the residential property, and no legal or equitable duty to grant the Burroughs a mortgage. As a volunteer, Flagstar was not entitled to equitable subrogation. Additionally, although Flagstar asserts that it reasonably expected that Northwestern would agree to subordinate its lien, no evidence was presented that Northwestern

was ever asked to sign a subordination agreement, and it is undisputed that such an agreement does not exist. Accordingly, the trial court did not err in dismissing Flagstar's equitable subrogation claim.

We affirm.

/s/ Richard A. Bandstra
/s/ Michael J. Talbot
/s/ Bill Schuette