STATE OF MICHIGAN

COURT OF APPEALS

MICHAEL BADRAN and ANTONITA BADRAN, Plaintiffs-Appellants, v HOUSEHOLD FINANCE CORP, III, Defendant-Appellee.	UNPUBLISHED September 23, 2008 No. 279026 Wayne Circuit Court LC No. 05-534153-CH

Before: Murray, P.J., and Whitbeck and Talbot, JJ.

PER CURIAM.

Plaintiffs appeal as of right from the trial court's May 23, 2007, order granting summary disposition in defendant's favor. Plaintiffs argue that the trial court erred when it granted summary disposition in defendant's favor, based on its erroneous conclusion that Mounir Badran's transfer of the questioned property via a quitclaim deed to his brother, Michael Badran, was nullified because it did not comply with the terms of Equicredit's mortgage. Plaintiffs further argue that summary disposition should have been granted in their favor under either MCR 2.116(C)(9) because of defendant's failure "to properly allege affirmative defenses,"[1] or under MCR 2.116(C)(10) because there is no genuine issue of material fact that under Michigan's race/notice statute plaintiffs have a priority interest in the questioned property because they recorded their interest first. Defendant argues that we should affirm the trial court's order because the trial court did not err when it found that the deed was nullified or, in the alternative, under a theory of equitable subrogation. We reverse the trial court's order as the trial court erred when it concluded that Mounir's transfer of the questioned property to Michael was nullified,

[1] In defendant's answer to plaintiffs' petition, defendant denied plaintiffs' allegation that they were not involved in Mounir's fraudulent loan application, as well as plaintiffs' claim that defendant violated MCL 600.2932 when it attempted to sell the property. Defendant also asserted the affirmative defenses of failure "to state a claim upon which relief can be granted," and that plaintiffs' claims should be barred based on their wrongful conduct. We cannot discern a basis for concluding that the trial court erred when it denied plaintiffs' motion for summary disposition pursuant to MCR 2.116(C)(9). See *Nasser v Auto Club Ins Ass'n*, 435 Mich 33, 47-48; 457 NW2d 637 (1990).

and remand this matter to the trial court so that it can make a determination of whether defendant is entitled to judgment based upon a theory of equitable subrogation.

I. Facts and Procedural History

On November 13, 1998, Mounir purchased the questioned property for approximately $152,000 from Rhagida Saad. The purchase was funded in large part by a $129,000 loan that Mounir obtained from Equicredit in exchange for a mortgage on the property. In relevant part, the terms of Equicredit's mortgage state that Mounir was not allowed to transfer or sell the property without Equicredit's prior written consent, which could be given if certain conditions were met:

> **17. Transfer of the Property or a Beneficial Interest in Borrower.** If all or any part of the Property or an interest therein is sold or transferred by the Borrower . . . without Lender's prior written consent . . . Lender *may, at Lender's option,* declare all the sums secured by this Security Instrument to be immediately due and payable.
>
> * * *
>
> Lender may consent, at its sole election, to a sale or transfer if: (1) Borrower causes to be submitted to Lender information required by Lender to evaluate the transferee as if a new loan were being made to the transferee; (2) Lender reasonably determines that Lender's security will not be impaired and that the risk of a breach of any covenant or agreement in this Security Instrument is acceptable; (3) interest will be payable on the sums secured by this Security Instrument at a rate acceptable to Lender; (4) changes in the terms of the Note and this Security Instrument required by Lender are made, including, for example, periodic adjustment in the interest rate, a different final payment date for the loan, and addition of unpaid interest to principal; and (5) the transferee signs an assumption agreement that is acceptable to Lender and that obligates the transferee to keep all the promises and agreements made in the Note and in this Security Instrument. . . . [(Emphasis added).]

On August 25, 2000, Mounir transferred the property to Michael via a quitclaim deed because he allegedly could no longer afford to pay the Equicredit mortgage. Although the deed does not recite any consideration for the transfer, nor has any evidence of a purchase agreement ever been presented, Michael alleges that he orally agreed to pay $125,000 for the property. Michael stated that he waived Mounir's debt ($3,800 that Michael borrowed Mounir for his down payment, as well as an undisclosed amount that Michael paid to cover the 1999 property tax), gave Mounir $13,000 cash, allowed Mounir to continue collecting rent money that was owed, and agreed to payoff the remainder of Equicredit's mortgage, which Michael admitted was less than the value of the property. Michael generally made mortgage payments directly to Equicredit, but on occasion (when Michael was out of town) Michael would give cash payments to Mounir and have him make the Equicredit payments. Although it is undisputed that Equicredit never gave prior written consent for Mounir to transfer/sell the property to Michael, Michael alleges that Mounir called Equicredit and informed them that he had transferred ownership to Michael. Michael alleges that Equicredit had no problem with the transfer of

ownership and never even discussed the possibility of Michael signing an assumption agreement, but rather just allowed them to keep the mortgage in Mounir's name.

Michael recorded the deed on June 26, 2001. On January 10, 2002, approximately six months after Michael recorded his interest in the property, *Mounir* obtained a loan from defendant for approximately $159,000, in exchange for a mortgage on the questioned property, a property that Mounir had no legal interest in. The loan, in part, was used to payoff the entire Equicredit mortgage.

Before obtaining the loan, Mounir, in relevant part, needed to establish that he was employed and that he had an interest in the questioned property. In order to establish that Mounir was employed by M & H Petroleum (MHP), Andrew Zych, who works for defendant and assisted Mounir in obtaining the loan, had Mounir produce 2001 and 2002 W-2 forms, a recent paycheck (allegedly signed by Sami Berri)[2] and a completed employment verification form (allegedly signed by Berri). Although Berri acknowledged that Mounir might have worked for him on more than one occasion,[3] Berri believed that Mounir only worked for him on one occasion for approximately one month as the night shift cashier. Berri further stated that his signature on the paycheck and employment verification was fraudulent, as he never signed either document, and furthermore, he never issued paychecks or W-2's, as he had Michael pay all employees in cash. Berri further suggested that the paycheck, which came from an MHP checkbook, was likely stolen from his office at the gas station, and that the W-2, which stated that Mounir made $43,000 a year, was "nonsense." In order to establish that he had an interest in the property despite the fact that the title search revealed that Mounir deeded the property to Michael, Mounir told Zych that Michael was his American name, and the purpose of the deed was to transfer the property to himself in his American name. Zych stated that he believed Mounir and was not suspicious because Michael's driver's license and W-2 forms verified that he still lived at the property, there was still a mortgage on the property (which in practice would have been discharged had the property been transferred to someone else), and furthermore, the deed listed Michael as a single man, and did not contain an amount of consideration given. Zych stated that he would not have issued the loan if he were aware of the fact that Mounir had no legal interest in the property.

Michael alleges that he was unaware of the fact that Mounir was obtaining a mortgage from defendant until "late" 2002 when he attempted to get another mortgage (refinance), which he was going to use, in part, to payoff what he thought was the existing Equicredit mortgage.[4]

---

[2] Sami Berri owned MHP from 1993 to 2002.

[3] Michael, who managed MHP from 1994 to 2002, stated that Mounir worked at MHP on and off for approximately eight months.

[4] It should be noted that despite the fact that Michael alleges that he was unaware of defendant's mortgage until "late" 2002, the record establishes that Michael wrote checks to defendant on February 25, 2002, May 28, 2002, and July 29, 2002. Although the checks appear to have been signed by Michael, Michael alleges that Mounir, whose name was on Michael's checking account, wrote the checks to defendant. Mounir had access to Michael's checking account until "mid-2003" when Michael finally removed Mounir from his account for a lack of trust.

Nonetheless, shortly after the time in which Michael alleges that he first learned of Mounir's mortgage from defendant, Michael contacted defendant to inquire whether defendant would remove the mortgage. Months later, defendant had not taken any steps to remove the mortgage.

In May 2004, Mounir left Michigan after receiving a letter from defendant regarding his default on the mortgage. Michael and his wife allege that they have not heard from Mounir since he left, and thus, do not know his whereabouts. After Mounir disappeared, both he and Michael stopped making payments to defendant. However, up until that time, Michael admitted that he either made payments to defendant out of his account, or gave Mounir money and made sure that Mounir made payments to defendant. On November 17, 2005, defendant sent Mounir a letter (which Michael opened) indicating that he was not up to date on his payments, and that defendant would pay him $1,000 to vacate the property and sign a deed in lieu of foreclosure. Michael did not respond to the letter. On November 30, 2005, defendant foreclosed on the property.

On November 29, 2005, plaintiffs filed a petition seeking a declaratory judgment to quiet title to the questioned property, arguing that since they properly recorded their interest in the property on June 26, 2001, defendant, who negligently issued Mounir a loan in exchange for a mortgage on a property that he no longer owned, violated MCL 600.2932 when it attempted to sell the property without having absolute title. On April 18, 2007, defendant filed a motion for summary disposition, arguing that summary disposition should be granted in its favor because Michael did not have a valid interest in the property because his deed from Mounir was nullified for failure to comply with the terms of Equicredit's mortgage, and alternatively, even if it were found that Michael received a valid interest, summary disposition should be granted in its favor under a theory of equitable subrogation.

The trial court granted defendant's motion for summary disposition, finding that Mounir's transfer of the property via a quitclaim deed to Michael had no legal effect:

> In August of 2002, [Mounir] gave [Michael] a quitclaim deed to the property. However that transfer had no legal effect, because the mortgage that was on the property at the time required prior written consent.
>
> So the alleged transfer was a nullity because of the provisions in the mortgage on the property with EquiCredit.
>
> So then [Mounir] refinanced in 2002 giving [defendant] a mortgage on the property. He then defaulted in 2004, they foreclosed and received a sheriff's deed at the sale.
>
> So this Court finds that [defendant] has title to the property. And the Court will grant [defendant's] Motion for Summary Disposition.

The trial court entered an order to this effect on May 23, 2007, which in addition to granting defendant's motion for summary disposition, also denied plaintiffs' motion for summary disposition, and ruled that plaintiff had no interest in the property, while defendant had a full vested fee title in the property. Plaintiffs' June 6, 2007, motion for reconsideration was denied.

II. Analysis

We first address plaintiffs' argument that the trial court erred when it granted summary disposition in defendant's favor, pursuant to MCR 2.116(C)(10), instead of in plaintiffs' favor.[5] We review de novo a trial court's decision to grant or deny a motion for summary disposition, *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003), viewing the pleadings, affidavits, depositions, admissions and other documentary evidence submitted in a light most favorable to the nonmoving party, *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004).

As previously discussed, the trial court granted summary disposition in defendant's favor based on its conclusion that Mounir's transfer of the questioned property to Michael was nullified because it was made without obtaining Equicredit's prior written consent, and thus, did not comply with the terms of Equicredit's mortgage. As pointed out by defendant, Equicredit's mortgage, in relevant part, provides that if Mounir sold or transferred the questioned property without Equicredit's "prior written consent," Equicredit had the option to "declare all the sums secured by [the mortgage] to be immediately due and payable." The mortgage also indicated that Equicredit could only consent to the sale or transfer if the transferee signed an assumption agreement that obligated the transferee to keep all the promises and agreements made by Mounir in the parties' security instrument.

"The primary goal in interpreting contracts is to determine and enforce the parties' intent." *Old Kent Bank v Sobczak*, 243 Mich App 57, 63; 620 NW2d 663 (2000). "To do so, this Court reads the agreement as a whole and attempts to apply the plain language of the contract itself." *Id*. An unambiguous contract allows but one interpretation, and therefore, will be enforced as written. *Morley v Automobile Club of Michigan*, 458 Mich 459, 465; 581 NW2d 237 (1998). Because plaintiffs never signed an assumption agreement, Equicredit could not have properly given its written consent for the sale/transfer of the questioned property.

Where the trial court erred, however, was the failure to recognize that under the plain language of the mortgage, Equicredit's sole remedy for Mounir's failure to obtain Equicredit's prior written consent before selling/transferring the property was to "declare all the sums secured [by the mortgage agreement] to be immediately due and payable," and not to nullify the deed. Furthermore, according to the plain language of the mortgage, any remedies that were available to Equicredit for a violation of the terms of the mortgage were only exercisable at Equicredit's option, an option that was undisputedly never exercised. Therefore, the contract contained the remedies available to Equicredit for the unconsented to transfer, but those were never exercised. For these reasons, the trial court erred when it nullified Mounir's deed to Michael based on the fact that Mounir violated the terms of Equicredit's mortgage when it sold/transferred the

---

[5] As an initial matter, we note that not only does plaintiffs' brief fail to comply with MCR 7.212(C)(6) and (7), *People v Norman*, 184 Mich App 255, 260; 457 NW2d 136 (1990), but it further fails to provide any legal authority in support of their position, *Mitcham v Detroit*, 355 Mich 182, 203; 94 NW2d 388 (1959). Despite these deficiencies, we will address the merits of plaintiffs' appeal.

property. *Morley, supra* at 465; See also *Short v Hollingsworth*, 291 Mich 271, 274; 289 NW 158 (1939) (holding that if "it appears to have been the intention that the remedy specified in the contract should be exclusive, the rights of the parties will be controlled thereby.")

Because Mounir's transfer to Michael cannot be nullified on the basis asserted by the trial court, and because Michael properly recorded his interest in the property approximately six months before Equicredit obtained a mortgage on the property, pursuant to Michigan's race-notice statute plaintiffs would "generally" have a priority interest over defendant. MCL 565.29; MCL 565.25(4); *Richards v Tibaldi*, 272 Mich App 522, 539; 726 NW2d 770 (2006).

However, defendant argues that plaintiffs' priority interest could be negated under a theory of equitable subrogation. 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." *Hartford Accident & Indemnity Co v Used Car Factory, Inc*, 461 Mich 210, 215; 600 NW2d 630 (1999), quoting *Commercial Union Ins Co v Medical Protective Co*, 426 Mich 109, 117; 393 NW2d 479 (1986). The application of equitable subrogation "is proper in all cases ... where injustice would follow its denial." *Stroh v O'Hearn*, 176 Mich 164, 177; 142 NW2d 865 (1913). In accordance with the tenets of this doctrine, a subrogee may not be "a mere volunteer who has no equities which appeal to the conscience of the court," for example, the subrogee cannot have voluntarily made payment, "but rather must have done so in order to fulfill a legal or equitable duty owed to the subrogor." *Ameriquest Mortgage Co v Alton*, 273 Mich App 84, 94-96; 731 NW2d 99 (2006). Equitable subrogation is a "flexible, elastic doctrine of equity," which should be applied on a "case-by-case analysis characteristic of equity jurisprudence." *Id*. at 95.

Our Supreme Court has held that where a mortgagee advances money on a mortgage to pay a prior mortgage on the same property based on the false assumption that the mortgagor has valid title to the property, the mortgagee can be subrogated to the status of the prior mortgagee if there are no intervening liens "entitled to superior equities." *Sproal v Larsen*, 138 Mich 142, 143; 101 NW 213 (1904).[6] However, if there are intervening liens, equitable subrogation "cannot be used to avoid the dictates of [MCL 565.29]" to allow a new mortgage granted as part of a generic refinancing transaction to take the priority of the original mortgage unless the new mortgagee can establish that an intervening lien holder acted fraudulently. *Alton, supra* at 95, 99-100.

Given that the trial court never addressed this argument, we remand this matter to the trial court so that it can address whether defendant should be equitably subrogated to Equicredit's status[7] because of the unusual circumstances surrounding the loan that defendant issued Mounir

---

[6] The holding in *Sproal* is consistent with the Restatement, which provides that one "who fully performs an obligation of another, secured by a mortgage, becomes by subrogation the owner of . . . the mortgage to the extent necessary to prevent unjust enrichment." Restatement Property (Mortgages), 3d, § 7.6.

[7] If the trial court determines that equitable subrogation is applicable, defendant would likely be placed in the exact position that Equicredit was in, a position where it is owed $129,645.13, not a

(continued…)

and the fact that defendant paid off Michael's debt with Equicredit when it issued Mounir's loan.[8]

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

/s/ Christopher M. Murray
/s/ William C. Whitbeck
/s/ Michael J. Talbot

(…continued)

position where it is owed the entire amount that it lent to Mounir ($147,998.85). Otherwise, Michael would be in a worse position than he was before Mounir fraudulently obtained the questioned loan from defendant. *Wyman v Johnson*, 68 Ark 369; 59 SW 250 (1900) (holding that a party who is entitled to equitable subrogation, is subrogated to the status of the prior mortgagee "to the extent" that the proceeds it lent were used to satisfy the prior mortgage); See also, Restatement Property (Mortgages), 3d, § 7.6, comment e, illustration 28, pp 520-522 (stating that a "payor is subrogated only to the extent that the funds disbursed are actually applied toward payment of the prior lien. There is no right of subrogation with respect to any excess funds").

[8] Contrary to plaintiffs' argument, we conclude that defendant's answer properly preserved its ultimate defense of equitable subrogation as it adequately put plaintiffs on notice of such defense, allowing plaintiffs to adequately prepare their case. See *Stanke v State Farm Mutual Automobile Ins Co*, 200 Mich App 307, 317-318; 503 NW2d 758 (1993).