STATE OF MICHIGAN

COURT OF APPEALS

BANK ONE NATIONAL ASSOCIATION,

Plaintiff-Appellee,

v

FRANK A. VENTIMIGLIO, BRANDA M. VENTIMIGLIO, and PARAMOUNT BANK,

Defendants/Third Party Plaintiffs-Appellants,

and

MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC.,

Defendant-Appellant,

and

DIANE MAGNOLI and MICHAEL A. MAGNOLI,

Third Party Defendants.

UNPUBLISHED
June 4, 2009

No. 283824
Macomb Circuit Court
LC No. 2006-003118-CH

ON RECONSIDERATION

Before: Cavanagh, P.J., and Fort Hood and Davis, JJ.

PER CURIAM.

Defendants appeal as of right from the trial court's order granting plaintiff's motion for summary disposition. We originally affirmed, concluding that the trial court reached the right result for the wrong reasons, whereupon both parties moved for reconsideration. We granted reconsideration and, upon further consideration, we again affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

This matter involves competing titles to real estate that was originally owned by third-party defendants Diane and Michael Magnoli (the Magnolis). On October 27, 1997, the Magnolis conveyed the property to Michael Magnoli's construction company (the Company). That conveyance was recorded on March 24, 1998. On April 24, 1998, Jimmy and Diana

Reynolds (the Reynoldses) entered into a land contract with the Company to purchase the property for $250,000. The land contract was recorded on June 4, 1998.

When $220,000 was still owed on the land contract, the Reynoldses apparently decided that they wanted to change how they were to finance their purchase of the property. The plan was for the Reynoldses to pay $170,000 in cash to the Company and give the Company a mortgage for the remaining $50,000; the cash would be obtained from bank financing. On August 17, 1998, the Reynoldses gave the Company a mortgage for $50,000; three days later, on August 20, 1998, the Reynoldses gave a $224,000 mortgage to Sterling Van Dyke Credit Union.[1] On August 24, 1998, the Company executed a warranty deed for the property to the Reynoldses. That warranty deed does not mention the Company's mortgage.

On September 11, 1998, the Company's $50,000 mortgage was recorded. On October 6, 1998, Sterling's $224,000 mortgage was recorded. On August 13, 1999, the warranty deed from the Company to the Reynoldses was recorded.

On March 1, 2001, the Reynoldses gave another mortgage to World Wide Financial Services for $332,000. This was used to pay off the Sterling mortgage as well as other debts. The World Wide mortgage was recorded on April 11, 2001.

On September 9, 2002, World Wide assigned its mortgage to plaintiff Bank One. That assignment was recorded on October 23, 2002. Also in 2002, the Company commenced foreclosure proceedings on the $50,000 mortgage to the company. Notice was given by advertisement. The Magnolis purchased the property at a foreclosure sale, and the property was not redeemed. A Sheriff's Deed to the Magnolis was recorded on November 8, 2002.

On December 13, 2002, Bank One foreclosed its mortgage and was the purchaser at a foreclosure sale. The property was not redeemed. On December 16, 2002, the Sheriff's Deed to the Magnolis was re-recorded, and on December 20, 2002, the Sheriff's Deed to Bank One was recorded.

On June 29, 2004, the Magnolis executed a warranty deed for the property to defendants Frank and Branda Ventimiglio (the Ventimiglios) for $300,000. That deed was recorded on July 9, 2004. On September 16, 2005, the Ventimiglios gave two mortgages to defendant Paramount Bank, one for $270,000 and the other for $20,000. Those mortgages were recorded on September 28, 2005, and October 11, 2005, respectively. Plaintiff has sued to quiet title.

Both sides moved for summary disposition under MCR 2.116(C)(10) (no genuine issue of material fact). The trial court decided the motions without oral argument, ruling in favor of plaintiff and against defendants. The trial court first noted that defendants' interests hinged on the $50,000 mortgage from the Company to the Reynoldses, and concluded that that mortgage had been extinguished by the warranty deed from the Company to the Reynoldses because it was not noted as an exception on the deed. Because the Company's mortgage was not recorded at the time the deed was conveyed, there was no constructive notice of its existence. Finally, the trial court noted that MCL 565.151 provides:

[1] The additional money was apparently to pay other creditors. Furthermore, even though the $50,000 mortgage was made first, it facially purports to be a "second mortgage."

> That any conveyance of lands worded in substance as follows: "A.B. conveys and warrants to C.D. (here describe the premises) for the sum of (here insert the consideration)," the said conveyance being dated and duly signed, sealed and acknowledged by the grantor, shall be deemed and held to be a conveyance in fee simple to the grantee, his heirs and assigns, with covenant from the grantor for himself and his heirs and personal representatives, that he is lawfully seized of the premises, has good right to convey the same, and guarantees the quiet possession thereof; **that the same are free from all incumbrances**, and that he will warrant and defend the title to the same against all lawful claims. [Emphasis added by the trial court.]

The court concluded, "Therefore, Bank One was entitled to assume that the property was free and clear of all other mortgages, especially in the absence of any language in the warranty to the contrary."

We review a trial court's decision on a motion for summary disposition de novo. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). When reviewing a motion under MCR 2.116(C)(10), which tests the factual sufficiency of the complaint, this Court considers all evidence submitted by the parties in the light most favorable to the non-moving party and grants summary disposition only where the evidence fails to establish a genuine issue regarding any material fact. *Id*., 120.

We originally concluded that the trial court erred in finding that the warranty deed from the Company to the Reynoldses discharged the Company's $50,000 mortgage. We now conclude that the trial court was correct. At the time the Reynoldses gave the mortgage to Bank One's predecessor, the title record showed that the Reynoldses gave a mortgage to their land contract vendor, another mortgage to a bank, and then received from their land contract vendor absolute fee title in the form of a warranty deed. That deed, on its face, would have notified title searchers that, among other things, the grantor – and ostensible mortgagee – was warranting that no encumbrances existed on the property. The mortgagee and grantor were one and the same and would thus reasonably be expected to be aware of the continued existence of the mortgage had that been intended. Further, it is highly improbable that a bank would accept a mortgage subordinate to a prior and smaller mortgage, even if that earlier mortgage purports to be "second." In short, we conclude that the trial court correctly determined that, under the circumstances, Bank One was entitled to rely on the warranty deed being precisely what it purported to be: an absolute conveyance, free of the mortgage previously given to the grantor.

Furthermore, at the time the mortgage was given, the Reynoldses, as land contract vendees, did not even have legal title to the property upon which to convey a lien. *Zurcher v Herveat*, 238 Mich App 267, 291; 605 NW2d 329 (1999). The earliest case law in Michigan stated that, "[i]n equity, a mortgage is sometimes called a lien for a debt, and so it is, and something more: it is a transfer of the property itself, as security for the debt: it is a qualified estate and security. It is called a lien only in a loose and general sense, and then only by way of contrast to an estate absolute and indefeasible." *Mundy v Monroe*, 1 Mich 68, 72 (1848). Although a mortgage is not generally considered a true transfer of equitable title, the circumstances here, where a land contract vendee and holder of equitable title only gives a mortgage *back to the land contract vendor*, approaches a merger of both legal and equitable title in the mortgagee. Although in such a situation it is usually presumed that mortgages will not be

extinguished by merger, there is a long-standing exception where the rights of third parties are implicated. See *Union Bank & Trust Co, NA v Farmwald Development Corp*, 181 Mich App 538, 547; 450 NW2d 274 (1989). The interests of Bank One, a subsequent purchaser with, as discussed, no basis for perceiving that the Company's mortgage might still exist, certainly would be here.

The trial court correctly held that the deed should be "accepted at face," *Fletcher v Morlock*, 251 Mich 96, 98; 231 NW 59 (1930), at least as to any bona fide, good faith subsequent purchaser. Bank One is such a bona fide, good faith subsequent purchaser.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Karen M. Fort Hood
/s/ Alton T. Davis