STATE OF MICHIGAN

COURT OF APPEALS

DANIEL C. JOHNS,

Plaintiff,

v

JAMES T. DOVER III, DOVER, INC. OF FLINT, WILLIAM L. JACKSON, JR., HELEN B. JACKSON, and BLUE SKY TITLE AGENCY, L.L.C.;

Defendants,

and

E-LOAN, INC.,

Defendant/Cross-Plaintiff-Appellant,

and

JP MORGAN CHASE BANK, N.A.,

Intervening Defendant/Cross-Defendant/Third-Party Plaintiff-Appellee,

and

GREGORY WILSON, SANDRA WILSON, MERCHANTS BONDING COMPANY, AUTO OWNERS INSURANCE COMPANY, RUBY OWENS and DONALD DOVER,

Third-Party Defendants.

UNPUBLISHED
July 8, 2010

No. 291028
Oakland Circuit Court
LC No. 2007-080637-CH

Before: ZAHRA, P.J., and CAVANAGH and FITZGERALD, JJ.

PER CURIAM.

Defendant/cross-plaintiff, E-Loan, Inc. ("E-Loan"), appeals as of right an order, which dismissed its remaining claims against plaintiff, Daniel C. Johns, and dismissed plaintiff's claims. This appeal, however, deals with a previous order entered by the circuit court, which granted summary disposition in favor of intervening defendant, JP Morgan Chase Bank, N.A. ("Chase"), giving the Chase mortgage attached to the property at 1888 W. Tahquamenon Ct. in Bloomfield Hills priority over E-Loan's mortgage on the same property. We affirm.

I. PRIORITY OF MORTGAGE

E-Loan argues that the trial court erred when it, pursuant to MCR 2.116(C)(10), granted summary disposition in favor of Chase. We disagree.

We review a trial court's decision on a motion for summary disposition made under MCR 2.116(C)(10) de novo. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). When deciding a motion for summary disposition under this rule, a court must consider the pleadings, affidavits, depositions, admissions, and other documentary evidence then filed in the action or submitted by the parties in the light most favorable to the nonmoving party. MCR 2.116(G)(5); *Wilson v Alpena County Road Comm*, 474 Mich 161, 166; 713 NW2d 717 (2006). If the evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law. *Wilson*, 474 Mich App at 166.

A motion for summary disposition under MCR 2.116(C)(10) tests the factual sufficiency of a claim. *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004). The moving party must specifically identify the matters that have no disputed factual issues, and has the initial burden of supporting that position by affidavits, depositions, admission, or other documentary evidence. *Coblentz v Novi*, 475 Mich 558, 569; 719 NW2d 73 (2006). Then the party opposing the motion has the burden of showing by evidentiary materials that a genuine issue of material fact exists. *Id.* A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds could differ. *Allison v AEW Capital Mgt, LLP*, 481 Mich 419, 425; 751 NW2d 8 (2008).

The Legislature codified actions to quiet title in MCL 600.2932(1), which provides:

> [a]ny person, whether he is in possession of the land in question or not, who claims any right in, title to, equitable title to, interest in, or right to possession of land, may bring an action in the circuit courts against any other person who claims or might claim any interest inconsistent with the interest claimed by the plaintiff.

In an action to quiet title to land, the moving party has the burden of proof to make out a prima facie case of title. *Beulah Hoagland Appleton Qualified Personal Residence Trust v Emmet Co Rd Comm*, 236 Mich App 546, 550; 600 NW2d 698 (1999). Once a moving party establishes a prima facie case, the opposing party has the burden to show that it has superior title. *Id.* To make its prima facie case of title, Chase provided the circuit court with a copy of a mortgage to the property that it was granted by William Jackson and Helen Jackson. The mortgage was recorded with the Oakland County Register of Deeds on May 4, 2006. E-Loan argues that Chase failed to meet its evidentiary burden because evidence was presented that

showed that the Jacksons obtained their "title" through a forged deed. However, E-Loan is ignoring the purpose of Chase's motion. Chase's motion for summary disposition was solely to determine the respective rights *between Chase and E-Loan*. E-Loan, itself, gained any property interest it had from a subsequent mortgage granted by the Jacksons. Our Supreme Court established over a century ago that "[p]roof that both parties claim the same source of title is sufficient evidence of title without tracing it through a chain of conveyances." *Killackey v Killackey*, 156 Mich 127, 133-134; 120 NW 680 (1909). Thus, E-Loan's argument that Chase failed to establish a prima facie case is unfounded.

The next issue to resolve is the effect of the discharge of Chase's mortgage that was recorded. Chase presented evidence in the form of an affidavit that, *inter alia*, (1) Chase never authorized the discharge; (2) the person, "Pat Bolden," who signed off on the discharge never worked for Chase at any time; (3) the entire principle of $2,275,000 was still owed to Chase; and (4) the entity "DBR" listed on the discharge had no affiliation with Chase. E-Loan, on the other hand, produced no evidence that rebutted any of Chase's assertions. Accordingly, there is no question of material fact that the discharge of Chase's mortgage was not of its own doing– instead it was a third party who forged the document. E-Loan attempts to demonstrate that the act of discharging the mortgage was a "mistake" by relying on the words "erroneously discharged" that Chase used in its claim of interest, recorded after the existence of the discharge was realized. However, how any party characterizes the situation, including that isolated choice of words, does not alter any of the facts. The undisputed fact remains that Chase's mortgage was discharged through a forged document.

In a case that is directly on point, our Supreme Court stated that a forged discharge of mortgage, through no fault of the mortgagee, has no effect. *Keller v Hannah*, 52 Mich 535, 536; 18 NW 346 (1884). Moreover, a recorded forged discharge does not allow a subsequent mortgagee to have priority over the first-in-time mortgagee. *Id.* The rationale for this principle is that the original mortgagee should not be punished when it was not the first-in-time mortgagee's fault that the latter mortgagee was deceived. *Id.* This type of treatment of forged documents is pervasive throughout Michigan case law, where even a good-faith purchaser is afforded no protections when a forged deed is used to acquire property interests. See *Horvath v Nat'l Mortgage Co*, 238 Mich 354, 360; 213 NW 202 (1927); *Special Property VI v Woodruff*, 273 Mich App 586, 591; 730 NW2d 753 (2007); *VanderWall v Midkiff*, 166 Mich App 668, 685; 421 NW2d 263 (1988). Thus, because Chase's mortgage was recorded as discharged through the use of a forged instrument, E-Loan cannot claim any priority on the basis that it was a bona fide purchaser.

E-Loan argues that cases such as *Lowry v Bennett*, 119 Mich 301; 77 NW 935 (1899), and *Ferguson v Glassford*, 68 Mich 36; 35 NW 820 (1888), mandate that it should prevail because they afford protections to bona fide purchasers. However, these cases dealt explicitly with discharges that were recorded *intentionally*, but mistakenly, by the original mortgagee. *Lowry*, 119 Mich at 302; *Ferguson*, 68 Mich at 37, 39. As noted earlier, there is no dispute that the discharge of mortgage that was recorded was a forgery, and as a result, E-Loan gains no protections from being a subsequent bona fide purchaser.

Next, E-Loan argues that it should have prevailed because it has certain equitable defenses against Chase. First, E-Loan claims that the defense of laches should act as a bar to Chase prevailing in its motion for summary disposition. "The doctrine of laches is concerned

with unreasonable delay that results in 'circumstances that would render inequitable any grant of relief to the dilatory plaintiff.'" *Yankee Springs Twp v Fox*, 264 Mich App 604, 611-612; 692 NW2d 728 (2004), quoting *In re Contempt of United Stationers Supply Co*, 239 Mich App 496, 503-504; 608 NW2d 105 (2000). Laches does not apply unless the delay of one party resulted in prejudice to the other party. *Tomczik v State Tenure Comm*, 175 Mich App 495, 503; 438 NW2d 642 (1989). Here, E-Loan did not identify how Chase was dilatory in any aspect. E-Loan only identified how plaintiff arguably prejudiced E-Loan by not recording a claim of interest after he first became aware, in May 2006, of the forged deed to Dover, Inc. E-Loan argues that it would not have provided a loan in September 2006 to the Jacksons if plaintiff had made such a recording. However, that is a defense against plaintiff—not Chase. Accordingly, equity does not require that E-Loan should have prevailed in Chase's motion for summary disposition.

Likewise, E-Loan's argument that its mortgage should be considered a construction lien is unsupported. E-Loan claims that it is entitled to the heightened priority of a construction lien[1] because the funds of its loan were used to pay off the MX Realco construction loan. However, MCL 570.1111 requires that for anyone to take advantage of the benefits of a "construction" lien, that person must record the lien within 90 days after the lien claimant's last furnishing of labor or material for the improvement. Here, MX Realco recorded its lien on August 23, 2006, which was later than 90 days from when it stated the last improvements were made on May 1, 2006. Accordingly, MX Realco did not have a construction lien that was entitled to priority over any earlier mortgages. Thus, even if E-Loan could step into MX Realco's shoes, it would not be getting the special priority reserved for "construction" liens, and this defense fails.

Finally, E-Loan argues that because the loan it gave to the Jacksons was used to pay off the construction loan, that it should have prevailed on Chase's motion for summary disposition. E-Loan relies on *Richardson v Richardson*, 266 Mich 194; 253 NW 265 (1934), which held that, where a grantee obtained a void deed through fraud in the factum, the subsequent mortgage was not to be voided because the deceived grantor gained some benefits from the loan funds. *Richardson*, 266 Mich at 197-198. But *Richardson* is not relevant in this instance because the present issue was not whether the E-Loan mortgage should be voided or cancelled because the grantee/mortgagor had no property interest. The only issue addressed in the motion for summary disposition was the *priority* of the E-Loan mortgage compared with Chase's mortgage.

Therefore, because the discharge of Chase's mortgage was a forgery and none of the equitable defenses proffered by E-Loan were applicable to the present situation, Chase was entitled to summary disposition on the issue of whether it had priority over the E-Loan mortgage, and E-Loan's claim fails.

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[1] MCL 570.1119(3): "A construction lien arising under this act shall take priority over all other interests, liens, or encumbrances which may attach to the building, structure, or improvement, or upon the real property on which the building, structure, or improvement is erected when the other interests, liens, or encumbrances are recorded subsequent to the first actual physical improvement."

II. ADMISSIBILITY/CONSIDERATION OF SETTLEMENT AGREEMENT

E-Loan next argues that the trial court's decision granting Chase's motion for summary disposition should be reversed because Chase improperly supported its position with a copy of a settlement agreement that Chase entered into with Johns. We disagree.

Issues must be raised at and decided by the lower court in order to preserve the issue for appeal. *Fast Air, Inc v Knight*, 235 Mich App 541, 549; 599 NW2d 489 (1999). E-Loan raised the admissibility of the settlement as an issue at the motion hearing, but the trial court never ruled on its objection. Thus, the issue is not preserved. However, this Court may address issues not addressed by the trial court if the issue concerns a legal issue and the facts necessary for its resolution have been presented. *Sutton v Oak Park*, 251 Mich App 345, 349; 650 NW2d 404 (2002). When the admission of evidence involves a preliminary question of law, such as whether a statute or other rule precludes the admissibility of the evidence, this Court reviews the issue de novo. *Mich Dept of Transp v Tomkins*, 270 Mich App 153, 157; 715 NW2d 363 (2006), rev'd on other grounds 481 Mich 184 (2008).

As noted earlier, when dealing with a motion for summary disposition under MCR 2.116(C)(10), the moving party must specifically identify the matters that have no disputed factual issues and has the initial burden of supporting that position by affidavits, depositions, admission, or other documentary evidence. *Coblentz*, 475 Mich at 569. MCR 2.116(G)(6) provides that such documentary evidence "shall only be considered to the extent that the content or substance would be admissible as evidence to establish or deny the grounds stated in the motion." *Dextrom v Wexford Co*, ___ Mich App ___; ___ NW2d ___ (Docket No. 281020, issued March 9, 2010), slip op, p 12. Thus, the only question is whether the trial court improperly considered any inadmissible evidence.

MRE 408 states, in pertinent part:

> Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount.

This rule of exclusion even applies to settlement agreements where only some of the parties to an action participated in a settlement and that agreement is offered against another party to the action who did not participate in the settlement. *Mich State Highway Comm'n v Copper Range R Co*, 105 Mich App 40, 43; 306 NW2d 384 (1981). The agreement between Chase and plaintiff stated that if Chase was successful in its motion for summary disposition against E-Loan, then plaintiff would convey via quit claim deed any and all interests he had to the Jacksons. Chase offered the settlement agreement to show that it had (or will have) a valid interest in the property because it was the Jacksons who granted the mortgage to Chase. However, because none of the terms of the agreement were in effect when the trial court made its decision on the motion, the agreement was irrelevant and should not have been considered.

E-Loan admits that, when the trial court rendered its decision to grant summary disposition, it never referenced E-Loan's objection to the settlement agreement nor did the trial

court reference any aspect of the settlement agreement. Thus, we cannot determine whether the trial court relied on the agreement. In any event, the issue is moot because, regardless of any agreement, we conclude that Chase made its prima facie case of a property interest by showing that a common grantor, the Jacksons, granted mortgages to both Chase and E-Loan. Accordingly, E-Loan's claim fails. *Ryan v Ryan*, 260 Mich App 315, 330; 677 NW2d 899 (2004) (A case is moot if it presents only abstract questions of law that do not rest on existing facts or rights).

Affirmed.

/s/ Brian K. Zahra
/s/ Mark J. Cavanagh
/s/ E. Thomas Fitzgerald