STATE OF MICHIGAN

COURT OF APPEALS

US BANK, N.A., TRUSTEE

Plaintiff-Appellee,

v

DAVID WHITTIER, SHAUNETTE WHITTIER, JOHN E. SMITH, and JENNIFER SMITH,

Defendants,

and

WILLIAM ROBERTS and SANDRA ROBERTS,

Defendants-Appellants.

UNPUBLISHED
November 16, 2010

No. 293481
Genesee Circuit Court
LC No. 08-090243-CZ

Before: MURPHY, C.J., and METER and SHAPIRO, JJ.

PER CURIAM.

Defendants William and Sandra Roberts (the Roberts) appeal as of right the trial court's order granting summary disposition in favor of plaintiff US Bank, N.A., Trustee (the bank), as well as the court's order denying their motion for reconsideration. We reverse and remand for further proceedings.

I. FACTUAL AND PROCEDURAL BACKGROUND

In November 2000, defendant David Whittier acquired a parcel of real property located on Elms Road in Clio, Michigan. The bank alleged, without dispute, that the property had been conveyed to David Whittier for the sum of $105,000 pursuant to a warranty deed. We shall refer to this parcel as parcel A.[1] Parcel A is an improved lot that contains a house, garage, and a pole

[1] While parcel A had been conveyed to David Whittier, defendant Shaunette Whittier, David's wife, is treated by all parties as also having held an interest in parcel A, which interest was reflected in subsequent real estate documents pertaining to parcel A.

barn, and it has, as indicated above, frontage on Elms Road. Directly adjacent to parcel A to the north is a parcel of property owned by the Roberts. The Roberts' house is located on the property, which also has frontage on Elms Road. Further to the north down Elms Road is a parcel of property owned by defendants John and Jennifer Smith (the Smiths).[2] In August 2001, a parcel of vacant and unimproved real property was conveyed to David and Shaunette Whittier (the Whittiers), which parcel is located directly behind parcel A, but which also extends north behind the parcels owned by the Roberts and the Smiths.[3] Essentially, what existed were four adjacent parcels on Elms Road separately owned by the Whittiers, Roberts, Smiths, and whomever owned the parcel between the Roberts' and Smiths' parcels, with one long, large vacant parcel, owned by the Whittiers, that stretched behind the rear boundary lines of all four parcels. We shall refer to this vacant parcel then owned by the Whittiers as parcel B, making the Whittiers owners of parcels A and B in August 2001.

The bank alleged, without dispute, that during the 2001 tax year, the township assessor combined parcels A and B for purposes of a tax identification number, and, when discussing lots A and B *in combination*, we shall on occasion refer to the combined parcel as parcel C. In the summer of 2005, the Whittiers sought refinancing, and an appraisal was done by A & S Appraisal Group, Inc., which appraised parcel C at $180,000.[4] Thereafter, in September 2005, the Whittiers obtained a $144,000 loan to refinance the property through Flexpoint Funding Corporation (Flexpoint). The loan was secured by a mortgage, which was recorded; however, the legal description in the mortgage only described and encumbered parcel B, i.e., Whittiers' vacant parcel, and not parcel A. The bank, which was assigned the mortgage by Flexpoint in February 2007, alleged that the intent of all parties to the refinancing was for the mortgage to encumber parcel C in its entirety. The assignment of mortgage also refers solely to parcel B.

The bank alleged, and the Smiths admitted, that in October 2006, the Whittiers conveyed a portion of parcel B to the Smiths for $5,000 pursuant to a quitclaim deed. This conveyance gave the Smiths that portion of vacant parcel B located directly behind their home parcel. In November 2006, the Whittiers conveyed another portion of parcel B to the Roberts for $10,000 pursuant to a quitclaim deed. This conveyance gave the Roberts that portion of vacant parcel B located directly behind their home parcel, plus that portion of vacant parcel B located immediately behind the parcel on Elms Road that was situated between the Smiths' and Roberts' home parcels. Thus, the Whittiers were left with parcel A, fronting Elms Road upon which their

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[2] There is one parcel that lies directly between the parcels owned by the Roberts and the Smiths. This parcel is not discussed by the parties, nor is it the subject of any dispute.

[3] The bank alleged, without dispute, that the Whittiers purchased the vacant lot for the sum of $13,000 pursuant to a warranty deed.

[4] The appraisal dollar amount was alleged by the bank. While the bank presented a portion of the appraisal which indicates that the appraisal covered parcel C, and thus both lots A and B, the document does not reflect the dollar amount of the appraisal. However, no one appears to dispute the claim that parcel C appraised at $180,000.

house was located, plus all that was left of parcel B, which was just that vacant area directly behind parcel A. Recall that all of the parcel B land conveyed to the Smiths and Roberts was land described in the mortgage that was granted by the Whittiers to Flexpoint and later assigned to the bank.

The Whittiers defaulted on the loan and, in June 2007, foreclosure proceedings were commenced. The foreclosure process was controlled by Chapter 32 of the Revised Judicature Act, which chapter is found at MCL 600.3201 *et seq.*, and pertains to foreclosure of mortgages by advertisement, given that a "power of sale" clause was contained in the Whittiers' mortgage.[5] An affidavit of publication, required by MCL 600.3208, indicates that the four mandated published notices contained a legal description of parcel B, and parcel B alone. An affidavit of posting, also required by MCL 600.3208, indicates that the notice was posted on the Whittiers' home, i.e., parcel A. There is additional documentary evidence, including a joint affidavit from the Whittiers, providing that the notice was posted on the Whittiers' home. There is no evidence suggesting that the notice was posted anywhere on parcel B. In November 2007, a foreclosure sale was held, and the bank purchased the mortgaged premises for $155,977, as evidenced by a recorded sheriff's deed on mortgage sale. The sheriff's deed, consistent with the mortgage, assignment of mortgage, and affidavit of publication, solely describes vacant parcel B as the property being purchased by the bank at the foreclosure sale. An affidavit of abandonment executed by the bank indicates that an agent of the bank personally inspected the "mortgaged premises" in July 2008 and discovered that no persons were occupying the premises. This affidavit states that the mortgaged property was residential property, clearly alluding to parcel A, the Whittiers' home. A notice was posted at the home, which provided that the bank deemed the premises to be abandoned.

In December 2008, the bank filed its complaint, seeking, in count I, reformation of the mortgage's legal description. As indicated above, the bank alleged that "[t]he express actual intent of the parties was that Flexpoint's $144,000 loan to Whittier would be secured by a Mortgage on Parcel C in its entirety." The bank further alleged that, as a result of the material, mutual mistake, the legal description only referred to parcel B and did not include parcel A, which contained the house, garage, and pole barn. The bank requested that the court reform the mortgage so that the legal description encompasses parcels A and B or, in other words, parcel C. Additionally, in count II of the complaint, the bank sought to quiet title to all of parcel C in the bank's name. The bank asserted that the conveyances from the Whittiers to the Roberts and Smiths in 2006, which gave those couples portions of parcel B, were subject to the 2005 mortgage on that land. The bank further alleged that, as a result of the foreclosure sale in which

[5] "Every mortgage of real estate, which contains a power of sale, upon default being made in any condition of such mortgage, may be foreclosed by advertisement, in the cases and in the manner specified in this chapter." MCL 600.3201.

the bank purchased all of parcel B, any interests in parcel B held by the Roberts and Smiths were extinguished.[6] Therefore, the bank claimed that it held exclusive title to all of parcel B.

The Roberts, and the Smiths belatedly, filed answers and affirmative defenses. The Whittiers filed a handwritten note indicating that they were looking into the matter with the title company; they never did file an answer. In February 2009, the bank filed a motion for summary disposition under MCR 2.116(C)(9) and (10), arguing that, pursuant to MCL 565.29, the Roberts and Smiths were not good faith purchasers for value, that the Roberts and Smiths had constructive notice of the mortgage, that the bank complied with the statutory requirements of foreclosure, and that reformation of the mortgage to encumber parcel C in its entirety was necessary to reflect the actual intent of the parties to the mortgage. The bank prayed for an order reforming the mortgage and quieting title in its favor to all of parcel C. The Roberts responded by arguing that they pled valid defenses and that summary disposition was premature as discovery was necessary to explore the facts surrounding the execution of the mortgage. The trial court granted partial summary disposition in favor of the bank against the Roberts and Smiths relative to the quiet title count, finding that their purchases of portions of parcel B in 2006 were subject to the previously recorded mortgage and thus any interests were extinguished as a result of the foreclosure sale. The trial court, however, refused to grant summary disposition on the reformation count because it was premature, considering that the court had not heard from the Whittiers in regard to the extent of the property intended to be encumbered by the mortgage. The court recognized that the Whittiers had not participated in the suit thus far, but it directed the parties to attempt to obtain affidavits or deposition testimony from them on the issue of intent. We note that the Whittiers, although never filing a proper answer in the suit, were never defaulted; a summary disposition order, however, did eventually dispose of them as parties. The Roberts filed a motion for reconsideration, arguing that the foreclosure proceedings were improper because the notice was posted on parcel A, the Whittiers' home, instead of parcel B, which was the land described in the mortgage. Accordingly, the court should not have quieted title in favor of the bank. The Roberts also contended that the order granting summary disposition was premature as further discovery might possibly reveal a basis for a reformation counterclaim. The Roberts suggested that the parties to the mortgage may have intended to only encumber parcel A, not parcel B, given that parcel A is where the house, garage, and pole barn were located.

The trial court issued a written opinion and order on the Roberts' motion for reconsideration. The court refused to change its ruling quieting title in favor of the bank with respect to parcel B, which extinguished any interests that the Roberts and Smiths had acquired under the 2006 quitclaim deeds. As to the improper posting of notice on parcel A, the trial court found that MCL 600.3208 was intended to notify the mortgagor(s) of the foreclosure, here the Whittiers, not third parties to the mortgage such as the Roberts and Smiths. The court also reiterated that the Roberts had constructive notice of the mortgage when they purchased a portion

[6] We note that the bank refers to that portion of parcel B conveyed to the Smiths as parcel D and that portion conveyed to the Roberts as parcel E.

of parcel B in 2006. In regard to the property intended to be encumbered by the mortgage, the court ruled that the Roberts failed to present any documentary evidence suggesting that Flexpoint and the Whittiers had not intended to encumber parcel B. However, the court decided to give the Roberts 21 days to obtain supporting evidence if it existed.

Subsequently, the Roberts filed a supplemental motion for reconsideration after obtaining relevant documentary evidence. The Whittiers executed a joint affidavit in which they averred that it was their "intention to mortgage only the house and the property immediately behind the house, not the vacant land that was behind [the Roberts'] property." They further averred that it was their "intention to convey clear title to [the Roberts]; not to convey title subject to a mortgage." In a deposition, David Whittier testified that he and his wife never intended to mortgage portions of parcel B immediately behind the Roberts' home lot and the other lots, except for that portion of parcel B located immediately behind the Whittiers' home lot (parcel A). David Whittier explained that they had always intended to sell off portions of parcel B not located directly behind their home; therefore, he had no intent whatsoever to subject those portions to the 2005 mortgage or any mortgage. David Whittier testified that he could not recall seeing the appraiser. But he did recall specifically telling an agent for Flexpoint that he only wanted the appraisal and mortgage to cover parcel A and that portion of parcel B located immediately behind parcel A because of plans to sell the other portions of parcel B. And the agent called back a week later and said "you're all good to go, the appraisal guy said no problem." Mr. Whittier believed that he may have had a previously existing mortgage on all of parcel A and B and that part of the reason for refinancing was to pay off the existing mortgage while granting the new mortgagee, Flexpoint, a mortgage on parcel A and only on *part* of parcel B, just so he could sell those portions of parcel B that were no longer encumbered. David Whittier admitted that he did not read the large stack of refinancing closing documents; he just signed them. Shaunette Whittier testified in her deposition that it was never the Whittiers' intent to, in executing the mortgage, encumber the parcel B property sold to the Smiths and Roberts.

The Roberts also submitted their own joint affidavit. They averred that when they purchased their portion of parcel B from the Whittiers in 2006, the Whittiers informed them that there was no mortgage on the property. The Roberts also averred that the first time that they learned of the foreclosure was when the bank's lawsuit was filed. They further averred that had the notice been posted on parcel B, they "would have been able to take steps . . . to preserve [their] interests in the property during the redemption period." The bank replied that the appraisal clearly encompassed parcel A and all of parcel B and therefore so did the mortgage. Thus, any belief by the Whittiers to the contrary constituted a unilateral mistake, which is insufficient to support reformation absent fraud, and there was no evidence of fraud. The bank then filed a second motion for summary disposition, but solely against the Whittiers, arguing that the Whittiers never filed a proper answer and that the mortgage should be reformed to include parcel A, given the affidavits and deposition testimony by the Whittiers that clearly reflected their intent to encumber parcel A, the property on which their home was located.

The trial court subsequently entered an order granting the Roberts' supplemental motion for reconsideration, setting aside the order partially granting summary disposition in favor of the bank on the quiet title count, and allowing the Roberts to file a reformation counterclaim. However, the court then changed its position by first granting summary disposition in favor of the bank as to the Whittiers, which order reformed the mortgage to include parcel A while

retaining *all of parcel B*, and then by granting summary disposition in favor of the bank as to the Roberts and the Smiths, effectively denying the Roberts' supplemental motion for reconsideration and reversing its earlier order that had granted reconsideration. The trial court decided that the question of fact created by the documentation submitted by the Roberts was rendered moot by the Whittiers' failure to participate in the suit. At the heart of the court's ruling was the determination that, while there was evidence to support their position, the law did not provide the Roberts with standing, considering that they were not parties to the mortgage, nor third-party beneficiaries to the mortgage. Accordingly, the lack of standing governed the court's ruling, and the question of standing is a prominent issue argued by the Roberts in their appeal, yet entirely ignored by the bank in its response brief.

II. ANALYSIS

A. Standard of Review

This Court reviews de novo a trial court's ruling on a motion for summary disposition. *Manuel v Gill*, 481 Mich 637, 643; 753 NW2d 48 (2008). The issue of standing is a question of law that we likewise review de novo on appeal. *Id.* at 643-644. Finally, we also review de novo issues of statutory construction. *Detroit v Ambassador Bridge Co*, 481 Mich 29, 35; 748 NW2d 221 (2008).

B. Discussion

Reformation of Mortgage

The Roberts argue that they have standing to request reformation of the mortgage, where they were in privity with the Whittiers upon purchasing a portion of parcel B from the Whittiers, where that purchased portion of parcel B was encumbered under the language in the mortgage, and where that portion of parcel B was eventually foreclosed on by the bank. The Roberts further argue that the Whittiers' joint affidavit and their deposition testimony created an issue of fact concerning whether the mortgage was intended to encompass all of parcel B or, as claimed by the Whittiers, just that area of parcel B located immediately behind the Whittiers' home on parcel A. Therefore, because the Roberts have standing on the matter of mortgage reformation, and because there is an issue of fact with respect to whether the mortgage should be reformed such that it excludes the Roberts' property, the trial court erred in granting summary disposition in favor of the bank and in denying the motion for reconsideration.

The bank's appellate brief is silent on the issue of standing. Instead, the bank argues that the mortgage was intended to encumber all of parcel B as reflected in the legal description found in the mortgage appraisal. With respect to the affidavit and deposition testimony by the Whittiers, the bank argues that this evidence only proves a unilateral mistake on the part of the Whittiers, and reformation requires either a mutual mistake or a unilateral mistake coupled with fraud, and there was no fraud by Flexpoint. Finally, the bank argues that it was proper to quiet title in favor of the bank as to parcel B, where the bank's interest, under MCL 565.29, is superior to that held by the Roberts and Smiths, given the foreclosure sale and the fact that the 2005 mortgage was executed and recorded prior to the 2006 acquisitions of portions of parcel B.

We first address the standing issue. In *Lansing Schools Ed Ass'n v Lansing Bd of Ed*, __ Mich __; __ NW2d __, issued July 31, 2010 (Docket No. 138401), slip op at 22, the Michigan Supreme Court set forth the following principles that now govern a standing analysis:

> We hold that Michigan standing jurisprudence should be restored to a limited, prudential doctrine that is consistent with Michigan's long-standing historical approach to standing. Under this approach, a litigant has standing whenever there is a legal cause of action. Further, whenever a litigant meets the requirements of MCR 2.605, it is sufficient to establish standing to seek a declaratory judgment. Where a cause of action is not provided at law, then a court should, in its discretion, determine whether a litigant has standing. A litigant may have standing in this context if the litigant has a special injury or right, or substantial interest, that will be detrimentally affected in a manner different from the citizenry at large or if the statutory scheme implies that the Legislature intended to confer standing on the litigant.

We recognize that the Roberts were not parties to the mortgage; however, they have a substantial interest, a real property interest that could be detrimentally affected or harmed depending on resolution of the mortgage reformation question. It was the bank that initiated the reformation lawsuit, seeking to have the mortgage modified to reflect the true intent of the parties to the refinancing transaction, and the bank named the Roberts as party defendants to the action. The Roberts are entitled to present arguments and engage in the litigation concerning the Whittiers' intent when that intent can impact the Roberts' property rights. Questions whether the mortgage should be reformed and to what extent or how it should be reformed have a direct bearing on the property interest in parcel B purchased by the Roberts in 2006, regardless of the fact that they had constructive notice of the recorded mortgage. Moreover, the property interest held by the Roberts became subject to divestiture by way of the foreclosure proceedings and their interest was actually acquired by the bank at the sale, as reflected in the sheriff's deed. The Roberts most certainly have a legally protectable interest relative to the interpretation of the mortgage and possible changes to or reformation of the mortgage. That the Whittiers decided not to participate in the lawsuit does not mean that the bank is the only party who can have a say regarding mortgage reformation when that very mortgage encompassed property owned by the Roberts, as well as the Smiths.

"A deed of quit claim and release, of the form in common use, shall be sufficient to pass all the estate which the grantor could lawfully convey by a deed of bargain and sale." MCL 565.3. "It is clear beyond dispute that the grantee from a party conveying by quitclaim deed acquires the right and title which his grantor had and no other." *Brownell Realty, Inc v Kelly*, 103 Mich App 690, 695; 303 NW2d 871 (1981). Here, there is no dispute that the Whittiers had an interest in the property sold to the Roberts. And, while the conveyed interest may have been subject to the mortgage, an interest was acquired by the Roberts nonetheless.

In *Republic Bank v Modular One LLC*, 232 Mich App 444; 591 NW2d 335 (1998), overruled on other grounds in *Stokes v Millen Roofing Co*, 466 Mich 660; 649 NW2d 371 (2002), the defendant argued that the plaintiff lacked standing to challenge the validity of a lien that was foreclosed on because it was not a party to the construction contract that created the lien. This Court, in rejecting the defendant's argument, pointed out that a proceeding to

foreclose on a construction lien is an action "directed at the property rather than the person or entity who contracted for the services." *Republic Bank*, 232 Mich App at 447. In finding that the plaintiff had standing, the *Republic Bank* panel stated that an action attacking a lien arising out of a contract "must take place among those with an interest in the property." *Id.* at 448. Here, the Roberts are attacking the mortgage, as well as the foreclosure proceedings, and they have standing because of their interest in the property that was subject to the mortgage and foreclosure proceedings.

We also note our Supreme Court's decision in *Kowatch v Darnell*, 354 Mich 197, 201; 92 NW2d 342 (1958), wherein the Court stated:

> [A]fter the commissioner conveyed to the Darnells by a deed containing an erroneous description, he could have maintained an action for reformation against them to recapture title to the parcel which he had intended to sell and thought he had conveyed to the Kowatches. By his conveyance to [the Kowatches] the Kowatches *succeeded to such right.* [Emphasis added; citation omitted; see also *Nisbett v Milner*, 159 Mich 337, 343; 124 NW 22 (1909)(Court had no hesitation in holding that the equitable right of reformation passed to the mortgagee, and from the mortgagee, through conveyances, to the complainants).]

Here, the Whittiers had standing to litigate the issue of mortgage reformation predicated on execution of the mortgage and ownership of parcels A and B, and when they conveyed a portion of parcel B to the Roberts, the Roberts acquired standing to litigate the issue of mortgage reformation relative to their new property interest, which remained encumbered by the mortgage. The trial court erred in ruling that the Roberts lacked standing.[7]

Next, with respect to whether there are issues of fact relative to reforming the mortgage and the extent of any reformation, the trial court found that there was a factual dispute that, absent the lack of standing, should be determined at trial. We shall treat the bank's argument that there is no basis to reform the mortgage as requested by the Roberts as an alternative argument to affirm the trial court's rulings to grant the motion for summary disposition and to deny the motion for reconsideration.

Initially, we do uphold the trial court's decision to reform the mortgage, such that it encompasses parcel A. No one argues that Flexpoint and the Whittiers did not intend for parcel A to be included in the mortgage. Indeed, the Whittiers themselves averred and testified that they intended to encumber parcel A under the mortgage. The Whittiers and Flexpoint operated and proceeded under the mistaken belief that parcel A was included in the mortgage's description of the encumbered lands. The issue now is whether the mortgage should be further reformed such that the mortgage only encumbers parcel A and that portion of parcel B located immediately behind parcel A, instead of parcels A and B in their entirety, i.e., all of parcel C.

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[7] We note that it is unnecessary for the Roberts to file a counterclaim for reformation, as the issue can be addressed within the context of the bank's claim for reformation.

A court of equity has the authority to reform a contract in order to make it conform to the agreement actually made by the parties to the contract. *Casey v Auto-Owners Ins Co*, 273 Mich App 388, 398; 729 NW2d 277 (2006). To obtain reformation, a plaintiff must establish a mutual mistake of fact by clear and convincing evidence. *Id.* A mutual mistake of fact "means an erroneous belief, which is shared and relied on by both parties, about a material fact that affects the substance of the transaction." *Ford Motor Co v City of Woodhaven*, 475 Mich 425, 442; 716 NW2d 247 (2006). When a written instrument fails to express the intention of the parties because of mutual mistake, the equitable remedy of reformation may be ordered by the court. *Scott v Grow*, 301 Mich 226, 237; 3 NW2d 254 (1942) (addressing reformation of a deed). Reformation is proper if the parties agreed to accomplish a particular object by an executed instrument, but the instrument as executed failed to effectuate their intentions. *Id.* For purposes of reformation, parol evidence can be used to determine whether a contract evidences a mistake. *Id.* at 239. If an instrument does not reflect the actual intention of the parties because of a mistake in fact, equity will correct the mistake unless the rights of third parties intervene. *Id.* "Wherever an instrument is drawn with the intention of carrying into execution an agreement previously made, but which by mistake of the draftsman or scrivener, either as to law or fact[,] does not [fulfill] the intention, but violates it, there is ground to correct the mistake by reforming the instrument." *Id.* at 239-240 (citation and quotations omitted).

Here, the affidavit and deposition testimony by the Whittiers that was submitted to the trial court by the Roberts support a conclusion that there was an intention to solely encumber parcel A and that portion of parcel B located directly behind the Whittiers home or parcel A; there was no intention whatsoever to encumber the property found in parcel B that was eventually sold to the Roberts and Smiths. If this documentary evidence is deemed credible, the Whittiers were mistaken in their belief that the mortgage's legal description did not encompass all of parcel B, and this mistake concerns a material fact affecting the substance of the financing transaction. On the other hand, the bank relies solely on the mortgage appraisal, which contained a legal description of parcel A and all of parcel B. While it would have been more compelling to have evidence in the form of an affidavit or deposition testimony from the appraiser or Flexpoint agents on the matter, the appraisal would suggest that Flexpoint was proceeding on the belief and with the intent that the mortgage would encumber all of parcel B. Accordingly, there is a factual dispute concerning whether the parties to the mortgage intended to encumber all of parcel B or only that portion immediately behind parcel A and not the Roberts' and Smiths' properties.

However, the bank argues that, for purposes of a reformation remedy, the Whittier evidence submitted by the Roberts only proved a unilateral mistake and not a mutual mistake; therefore, the Roberts needed to also prove fraud on the part of Flexpoint. It is true that a "unilateral mistake is not sufficient to warrant reformation." *Casey*, 273 Mich App at 398. There must either be a mutual mistake of fact, "or mistake on one side and fraud on the other." *Id.*

When the affidavit and deposition testimony by the Whittiers is examined in a light most favorable to the Roberts, as we must for purposes of summary disposition, *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996), there is sufficient evidence to create an issue of fact on whether the mistake, or mistaken belief, was mutual. David Whittier testified that he told Flexpoint's agent that he only wanted the mortgage to encumber parcel A and that portion of parcel B located directly behind parcel A. According to Mr. Whittier, the agent called

him back a week later and said "you're all good to go, the appraisal guy said no problem."[8] A reasonable inference arising from this evidence is that Flexpoint's agent and the appraiser were operating under the intention that the mortgage only encumber part of parcel B and not the property later purchased by the Roberts and Smiths. *Skinner v Square D Co*, 445 Mich 153, 161; 516 NW2d 475 (1994)(court must consider reasonable inferences at summary disposition). If the trier of fact concludes that Flexpoint, through its agents, believed that the mortgage was not to encumber all of parcel B, it would establish a *mutual* mistake, assuming the trier of fact also finds that the Whittiers operated under the same mistaken belief as claimed. There is a genuine issue of material fact regarding the existence of a mutual mistake and for that reason, along with the presence of underlying issues of credibility and weight, summary disposition should not have been granted on the mortgage reformation count.

With respect to the bank's quiet title argument, if the mortgage is eventually reformed such that the Roberts' and Smiths' interests in parcel B are not subject to the mortgage, the foreclosure proceedings would have no application to those lands and the bank would not have title to said property; the fee simple interests would belong solely to the Roberts and Smiths. Accordingly, because the issue of reformation remains open, it is premature to answer the quiet title question.

Foreclosure Proceedings - Notice

The Roberts argue that the trial court erred in finding that they lacked standing to challenge the bank's failure to have the foreclosure notice posted on parcel B, where the mortgage only contained a legal description of parcel B. Of course, if the reformation issue is resolved in favor of the Roberts, title would be quieted in their favor, and this issue becomes moot.[9] We do direct the trial court to first resolve the reformation issue, guided by our discussion above. However, even if the trier of fact finds in favor of the bank on the reformation issue, we do conclude, for reasons explained below, that the foreclosure proceedings were nonetheless flawed because of the failure to correctly post the notice and thus the foreclosure sale would have to be vacated. Therefore, if the trier of fact finds in favor of the bank on the reformation issue, the bank must repeat the foreclosure proceedings.

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[8] We note that this evidence is not hearsay because it is not being offered to "prove the truth of the matter asserted," MRE 801(c). Rather, it is being offered to prove the intent or beliefs of the agent and appraiser by showing that, in their minds, the mortgage was only to encumber part of parcel B. We further note that, if the appraiser made this remark and made it after he completed and prepared the appraisal, the evidentiary weight of the appraisal would likely diminish significantly. We, however, have no evidence of a timeframe, nor can we weigh the evidence in the context of summary disposition. *Skinner v Square D Co*, 445 Mich 153, 161; 516 NW2d 475 (1994).

[9] The foreclosure sale would have to be vacated to the extent that it encompassed the Roberts' and Smiths' property rights in parcel B.

Our analysis above regarding standing is equally applicable here. Because the Roberts had an interest in a portion of parcel B, and because parcel B was subject to the mortgage and subject to the foreclosure proceedings, the Roberts have standing to challenge notice deficiency. With respect to MCL 600.3208, it provides:

> Notice that the mortgage will be foreclosed by a sale of the mortgaged premises, or some part of them, shall be given by publishing the same for 4 successive weeks at least once in each week, in a newspaper published in the county where the premises included in the mortgage and intended to be sold, or some part of them, are situated. If no newspaper is published in the county, the notice shall be published in a newspaper published in an adjacent county. In every case within 15 days after the first publication of the notice, *a true copy shall be posted in a conspicuous place upon any part of the premises described in the notice.* [Emphasis added.]

The notice here referred to the legal description of parcel B, but the notice was posted on parcel A and more specifically the Whittiers' house. Accordingly, the posted notice was defective. The bank argues that posting on parcel A was sufficient because the mortgage was intended to cover parcel A, along with parcel B, and the trial court reformed the mortgage such that it did encompass parcel A, which ruling we are leaving intact. The bank contends that because there was effectively one large parcel (parcel C) intended to be encumbered, posting anywhere on parcel C was sufficient, including the Whittiers' house. We agree with the Roberts that the post-foreclosure reformation as to parcel A does not make the defective notice retroactively sound. We cannot ignore the facts as they actually transpired, where notice impacted opportunities in relation to the subsequent foreclosure sale. The bottom line is that the mortgage and notice pertained to parcel B, the bank still demands that all of parcel B be subject to the mortgage, and the notice was not posted on parcel B as required by MCL 600.3208. Had the notice been properly posted at the time in accordance with MCL 600.3208, it is conceivable that the Roberts would have seen or become aware of the notice and taken action. They averred that such would be the case.

Not every posting failure requires vacating a foreclosure sale. In *Jackson Investment Corp v Pittsfield Products, Inc*, 162 Mich App 750, 755-756; 413 NW2d 99 (1987), this Court, holding that a defect in the foreclosure notice under MCL 600.3208 rendered the foreclosure sale voidable, but not absolutely void, explained:

> By holding that a defect renders a foreclosure sale voidable, rather than void, more security is given to the title of real property. Such a holding also allows for an examination of whether any harm was caused by the defect. In situations where it is evident that no harm was suffered, in that the mortgagor would have been in no better position had notice been fully proper and the mortgagor lost no potential opportunity to preserve some or any portion of his interest in the property, we see little merit in the rule of law which Jackson advocates. Such a rule would automatically nullify the sale without regard to or consideration of the intervening interests of other parties. We conclude that the trial court correctly held that the notice defect rendered the sale voidable and not void.

Here, the Roberts averred that had the notice been posted on parcel B, they "would have been able to take steps . . . to preserve [their] interests in the property during the redemption period." And they also averred that they only found out about the foreclosure and related sale when the instant lawsuit was filed. Although the bank argues that it is unlikely that the Roberts would have redeemed the property to protect their interest, given the amount paid for their portion of parcel B, they have indicated otherwise. Moreover, without determining its applicability, we note the language in MCL 600.3224, a statute cited by the Roberts, which provides:

> If the mortgaged premises consist of distinct farms, tracts, or lots not occupied as 1 parcel, they shall be *sold separately*, and no more farms, tracts, or lots shall be sold than shall be necessary to satisfy the amount due on such mortgage at the date of the notice of sale, with interest and the cost and expenses allowed by law but if distinct lots be occupied as 1 parcel, they may in such case be sold together. [Emphasis added.]

This statute is mandatory and was enacted by the Legislature to protect parties having interests in the mortgaged premises by insuring a right of redemption when the occupancy and ownership are other than as one parcel. *Cox v Townsend*, 90 Mich App 12, 15-16; 282 NW2d 223 (1979). "Whether the property consists of one parcel is a practical question depending upon the circumstances." *Id.* at 16. Tax roll sectioning and surveys do not necessarily control, as the question is ultimately whether the premises are held, treated, occupied, or used as one parcel at the time of the foreclosure sale. *Id.* at 16-18. There is at least an argument that parcel C was not held, treated, occupied, or used as one parcel, but rather it had distinguishing features as between the area encompassing parcel A and the area covering parcel B.

Again, we need not determine the applicability of MCL 600.3224. If the trier of fact finds in favor of the bank on the reformation question, the issue of the applicability of MCL 600.3224 can be decided at that time relative to the new foreclosure sale if it comes to fruition.

III. CONCLUSION

The trial court erred in finding that the Roberts lacked standing for purposes of reformation and challenging the failure of the posted notice. The trier of fact needs to resolve the issue of whether there was a mutual mistake of fact such that the mortgage requires reformation with respect to the encumbrance of parcel B. We leave intact the ruling reforming the mortgage to incorporate parcel A. If the trier of fact finds in favor of the Roberts on the reformation issue, the foreclosure sale is to be vacated to the extent that it encompassed the Roberts' and Smiths' property rights in parcel B, and the Roberts and Smiths will be entitled to an order quieting title in their favor as to the pertinent lands contained in parcel B.[10] If the trier of fact finds in favor of

[10] We recognize that the Smiths are not parties to this appeal. However, the Roberts' interests are identically aligned, for the most part, with those held by the Smiths, such that it would be illogical not to allow the Smiths the benefit of this opinion. A reformation of the mortgage as

the bank on the reformation issue, the foreclosure sale must nonetheless be vacated because of the notice defect in order to allow the Roberts and the Smiths an opportunity to exercise their rights under MCL 600.3201 *et seq.*, as owners of interests in the mortgaged property sought to be foreclosed upon.

We reverse and remand for proceedings consistent with this opinion. We do not retain jurisdiction. The Roberts having prevailed in full are awarded taxable costs under MCR 7.219.

/s/ William B. Murphy
/s/ Patrick M. Meter
/s/ Douglas B. Shapiro

argued for by the Roberts would by necessity result in the exclusion of the Smiths' property from the mortgage and foreclosure.