STATE OF MICHIGAN

COURT OF APPEALS

EMAD & JULLIE LLC, and EXCEL NATIONAL BANK, Plaintiffs-Appellees,	UNPUBLISHED May 8, 2012
v	No. 302459 St. Clair Circuit Court LC No. 09-003039-CH
COMMERCE FIRST FINANCIAL I, LLC, Defendant-Appellant,	
and FRED MOORE INVESTMENTS LLC, JJFY INC d/b/a FRED MOORE, BP, and CORRIGAN OIL CO NO II, Defendants.	

Before: WHITBECK, P.J., and JANSEN and K. F. KELLY, JJ.

PER CURIAM.

Defendant, Commerce First Financial I LLC (Commerce First), appeals as of right from an order granting plaintiffs, Emad & Jullie LLC (E&J) and Excel National Bank (Excel), summary disposition in this quiet title action. We affirm.

I. BASIC FACTS AND PROCEDURAL HISTORY

A. PLAINTIFFS' COMPLAINT AND THE PRELIMINARY INJUNCTION

Plaintiffs filed their complaint against Commerce First on November 23, 2009, seeking to quiet title to a gasoline station and convenience store E&J purchased from defendant Fred Moore Investments, LLC (Moore LLC). The complaint alleged the following facts: Jamal Jamil and Frank Yaldo were members of Moore LLC. Moore LLC was the fee owner of the gas station, having previously executed a first mortgage in the amount of $1,600,000 in favor of Oakland Commerce Bank and, a year later, executing a $800,000 second mortgage in favor of Main Street Bank (hereinafter Loan 150). Contemporaneous to the execution of the Main Street mortgage, Moore LLC executed an assignment of leases and rents in the principle amount of $250,000 (hereinafter Loan 169). Both Loan 150 and Loan 169 were secured by various properties, including the gas station, and the properties were cross-collateralized. On June 10, 2008, E&J

entered into a purchase agreement wherein it agreed to purchase the gas station from Moore LLC for $2,100,000. As a condition of purchase, E&J required that any encumbrances on the property be fully discharged. In order to finance the purchase, E&J obtained a loan from Excel in the amount of $1,775,000. At closing, Excel funds were used to pay off the first mortgage owned by Oakland Commerce in the amount of $1,452.983.80, as well as Loan 169 in the amount of $251,129.16. E&J were assured that title to the property was free and clear and that upon receiving $251,129.16, Main Street Bank would consider Loan 169 fully satisfied and would discharge the debt.

A warranty deed conveying the property from Moore LLC to E&J was recorded on October 9, 2008. Excel recorded its mortgage interest the same day. While Oakland Commerce filed a discharge of mortgage, Main Street Bank failed to do so, presumably because it was taken over by the Federal Deposit Insurance Corporation (FDIC) just weeks after the closing on October 10, 2008.

On February 24, 2009, the FDIC, as the receiver for the failed Main Street Bank, executed an assignment of promissory note and lien, assigning Loan 150 to Commerce First. Commerce First then began foreclosure proceedings against the property. On July 23, 2009, Commerce First purchased the property at sheriff's sale for $600,635.55. Plaintiffs brought suit, requesting, *inter alia*, that the trial court find them to be the fee owners of the gas station and declaring that Commerce First had no interest in the property.

Plaintiffs' November 30, 2009, initial motion for preliminary injunction to set aside the foreclosure was denied without prejudice on December 21, 2009, because the trial court believed that plaintiffs' rights were protected under the redemptive period, which was available until February 23, 2010. As the redemptive period grew nearer, plaintiffs renewed their motion for preliminary injunction and a hearing was held on February 8, 2010. Plaintiffs argued that they were now the owners in fee of the gas station because it was understood by all of the parties at closing that the property was no longer encumbered by Main Street Bank. Citing 12 USC 1823(e) and the *D'Oench Duhme*[1] doctrine, Commerce First argued that any unwritten agreement between Main Street Bank and its borrower (Moore LLC) was invalid, as the side deal effectively deprived the FDIC of a critical asset. As the purchaser of the loan portfolio, Commerce First claimed that it stood in the shoes of the FDIC. Plaintiffs countered that a warranty deed and mortgage were properly recorded, placing Commerce First on notice that another party held an interest in the property and that there was no "secret agreement" or attempt to deceive the FDIC. The trial court granted the injunction and acknowledged that there were numerous factual issues that would need to be decided in a quiet title action.

B. PLAINTIFFS' MOTION FOR SUMMARY DISPOSITION

On November 3, 2010, plaintiffs filed a motion for summary disposition pursuant to MCR 2.116(C)(9) (failure to state a valid defense) and (C)(10) (no genuine issue of material fact). Plaintiffs claimed that Main Street Bank no longer had an interest in the gas station (as

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[1] *D'Oench, Duhme & Co v FDIC,* 315 US 447, 453; 62 S Ct 676, 678; 86 L Ed2d 956 (1942).

evidenced by the September 23, 2008, Loan Payoff Statement) but that the FDIC took over Main Street Bank before it had the opportunity to record a formal discharge and release of mortgage. The FDIC used TheDebtExchange (DebtX) to prepare an asset summary for its Main Street Bank offering, which included the loan portfolios. Commerce purchased a loan package of eight Main Street Bank loans from the FDIC at a substantial discount on February 24, 2009, including Loan 150. Loan 169 was not included in the bundle, as it had been paid off in full. Loan 150 (for $550,000) was secured by numerous properties and had been cross-collateralized with Loan 169. Plaintiffs argued that using the DebtX service did not relieve Commerce First of its obligation to exercise due diligence in determining the status of the collateral on Loan 150. Had it done so, Commerce First would have discovered that the collateral had been discharged. Excel's mortgage interest was recorded on October 9, 2008, as was E&J's warranty deed. Plaintiffs argued that neither 12 USC 1823(e) nor the *D'Oench Duhme* doctrine were applicable because there was no collusive scheming to defraud the FDIC of its interests in the loan. Even if the statute and the doctrine applied, the Loan Payoff document satisfied the writing requirement.

Plaintiffs included a number of exhibits with their motion, including the Loan Payoff Statement. Former Main Street Bank loan officer Scott Gietzen averred that "it was understood that Main Street would accept a payoff of $250,000 from the proceeds of the sale of the Property from Moore LLC to its purchaser and discharge Loan 169 and the Main Street Mortgage and release the Property as collateral." The Loan Payoff reflected Main Street Bank's agreement to "discharge Loan 169 and the Main Street Mortgage and release the Property from its use as collateral for not only Loan 169, but all other Jamil/Yaldo related loans with Main Street." However, Main Street Bank was closed by the FDIC before the release/discharge was processed.

Former Main Street Bank CEO Daniel J. Wollschlager averred that Scott Gietzen requested approval of the loan payoff. "Gietzen represented that Jamil had requested that in exchange for the $250,000.00 payoff, Main Street would release the property as collateral so that Jamil could refinance the loan obligation or sell the Property to a third party . . . I authorized the discharge of the Mortgage securing the Property upon Main Street's receipt of the payoff amount of $250,000.00."

Adrienne Payne, Title coordinator for Able Title Agency, averred that "part of the sale proceeds were going to be used to pay off a loan with Main Street and release the Property as collateral from any loan obligations that Moore LLC or Jamil had with Main Street." Prior to closing, Main Street Bank provided a payoff amount of $250,886.11. "My conversation with the Main Street representative left me with the understanding of an agreement between the parties and Main Street that upon receipt of the aforementioned payoff funds, Main Street agreed to discharge its lien against the Property and release the Property because its loan with Moore LLC related to the Property was being satisfied." It was "agreed that the Main Street Loan Payoff represented the complete amount that Main Street required in order to issue a release of its lien against the Property so that Emad & Jullie would have clear title to the Property."

Commerce First filed a response to plaintiffs' motion for summary disposition, arguing that under 28 USC 1823(e), "the FDIC and its assigns are not subject to the defenses that Plaintiffs have asserted to the foreclosure. Specifically, Plaintiffs' defenses are based on an alleged 'agreement' between the seller of the property and [Main Street Bank], but the alleged 'agreement' does not meet the requirements of that statute." Commerce First maintained that it

reasonably relied on the information provided by DebtX, which included Loan 150, which, in turn, was cross-collateralized with Loan 169. A January 30, 2009, "Question and Answers" form on the DebtX website contains the following:

> [Q.] It appears loan 1040000150 & 1040000169 (Jamal Jamil) are cross-collateralized. Loan 1040000169 is not being offered in this sale. Can you confirm these are crossed? What is the status of 1040000169?
>
> [A.] Loan 1040000169 has been paid off, however the property has not been released and is still being used as additional collateral on Loan 1040000150. The necessary documentation is currently with Main Street and will [be] added as a trailing document when received.

After Commerce First purchased the portfolio, its representative Steve Houghton contacted Main Street Bank on March 2, 2009, with the following inquiry:

> Last week we closed with the FDIC loan sale MST-3-09-030. Loan number 1040000150 (Jamal A. Jamil) ("Loan 150") is cross collateralized with loan number 1040000169 ("Loan 169"). According to the Question and Answers documents by the FDIC prior to bidding, "Loan 1040000169 has been paid off, however the property has not been released and is still being used as additional collateral on Loan 1040000150." . . . It is very important to us the additional collateral referrenced [sic] is not inadvertently released by the FDIC.

Amy Salas as representative for the FDIC and Main Street Bank answered:

> I'm responding to your question on loan number 1040000150 (Jamal A. Jamil). We are aware that the collateral for loan #1040000169 and #1040000150 are cross collateralized and have not release [sic] any collateral referenced in the promissory note for the purchased loan #1040000150. In addition, the original mortgages from the paid off loan #1040000169 were sent to DebtX on 2/17/09 to be included in the active file #1040000150.

In formulating its bid for the entire portfolio, Commerce First argued that it reasonably assumed that it could fully collect on Loan 150.

Commerce First argued that the FDIC, as receiver, was not bound by any unwritten or side agreements between Main Street Bank and Moore LLC. In fact, the FDIC must be able to rely on the bank's written records. It claimed that plaintiffs failed to produce a writing sufficient to bind the FDIC under 12 USC 1823(e) and the *D'Oench Duhme* doctrine. In order to diminish the FDIC's interest in an asset it acquired as receiver, an agreement had to be: (1) in writing; (2) executed by the bank and any person claiming an adverse interest; (3) approved by the bank's board of directors as reflected in the minutes of the board committee; and, (4) an official record of the bank. Commerce First argued that parole evidence altering the rights and obligations of the parties could not defeat the FDIC's interest. Parties to a note with a failed bank could not claim an agreement or promise that was not specifically provided in the bank's records. That plaintiffs felt compelled to produce a number of affidavits regarding the parties' "understanding" demonstrated that no such written agreement existed. The payoff statement failed to identify the

collateral to be released and the payoff amount of $250,000 was far less than the face value of the total mortgage, which was $800,000.

A hearing on the motion and cross-motion took place on December 6, 2010. The parties reiterated the arguments made in their briefs. After reviewing the facts of the case, the trial concluded that equity compelled judgment in favor of plaintiffs. The trial court's January 24, 2011, order noted that, in addition to its finding that equity weighed in favor of plaintiffs, the Loan Payoff Statement read together with the affidavits executed by Main Street Bank officials evidenced a written agreement between the parties to discharge the mortgage. The trial court extinguished and discharged Commerce First's mortgage and Sheriff's Deed.

Commerce now appeals as of right.[2]

II. ANALYSIS

A. STANDARD OF REVIEW

This Court reviews a trial court's decision on a motion for summary disposition de novo, reviewing the record in the same manner as the trial court to determine whether the movant was entitled to judgment as a matter of law. *Latham v Barton Malow Co*, 480 Mich 105, 111; 746 NW2d 868 (2008). A motion for summary disposition under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *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 it has the initial burden of supporting its position by affidavits, depositions, admissions, or other documentary evidence. *Coblentz v Novi*, 475 Mich 558, 569; 719 NW2d 73 (2006). The party opposing the motion then has the burden of showing by evidentiary materials that a genuine issue of disputed material fact exists. *Id.* The existence of a disputed fact must be established by substantively admissible evidence, although the evidence need not be in admissible form. *Maiden v Rozwood*, 461 Mich 109, 121; 597 NW2d 817 (1999). 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).

B. FEDERAL PREEMPTION

As a preliminary matter, we disagree with plaintiffs' contention that Commerce First failed to preserve the issue of federal preemption for appellate review. Nevertheless, the issue of federal preemption, even if preserved, is inapplicable where there is no purported conflict between federal and state law. In *Packowski v United Food & Commercial Workers Local 951,* 289 Mich App 132, 139-140; 796 NW2d 94 (2010), this Court explained:

[2] This Court denied defendant's motion for peremptory reversal on May 19, 2011. *Emad & Jullie LLC v Commerce First Financial I LLC,* unpublished order of the Court of Appeals, entered May 19, 2011 (Docket No. 302459).

> Whether a federal statute preempts a state-law claim is a question of federal law. When such questions of federal law are involved, we are bound to follow the prevailing opinions of the United States Supreme Court. If a state-law proceeding is preempted by federal law, the state court lacks subject-matter jurisdiction to hear the state-law cause of action.
>
> "Preemption occurs when a state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." Preemption can also occur when a state or local regulation prevents a private entity from performing a function that Congress has tasked it with performing.
>
> There are three types of federal preemption: express preemption, conflict preemption, and field preemption. Express preemption occurs when a federal statute clearly states an intent to preempt state law or that intent is implied in a federal law's purpose and structure. Under conflict preemption, a federal law preempts state law to the extent that the state law directly conflicts with federal law or with the purposes and objectives of Congress. Field preemption acts to preempt state law when federal law so thoroughly occupies a legislative field that it is reasonable to infer that Congress did not intend for states to supplement it.

The true issue in this case is whether and to what extent § 1823(e) and the *D'Oench Duhme* doctrine applies. Neither of these is in conflict with state law.

C. 12 USC 1823(E) AND THE *D'OENCH DUHME* DOCTRINE

Commerce First argues that Main Street Bank and Moore LLC entered into a secret agreement to discharge the mortgage on the property, which had the effect of depriving the FDIC of one of Main Street Bank's assets. It claims that 12 USC 1823(e) and the *D'Oench Duhme* doctrine forbids plaintiffs from claiming a secret agreement with Main Street Bank in order to defeat the FDIC's interest.

The plaintiff in *D'Oench* executed a note in favor of a bank in order to deceive a state bank examiner by falsely inflating the bank's assets. The plaintiff and the bank had a separate agreement whereby the bank would not seek to enforce the note. The agreement was not in writing. The bank needed a loan from the FDIC to remain solvent, and the FDIC acquired the plaintiff's note as collateral for the loan. When the bank finally failed, the FDIC sought to enforce the note. The plaintiff defended on the basis of the parties' separate agreement and upon the ground that the note had been issued without adequate consideration. *D'Oench, Duhme & Co v FDIC,* 315 US 447, 453; 62 S Ct 676, 678; 86 L Ed2d 956 (1942). The United States Supreme Court held that the note was enforceable in the hands of the FDIC, finding that the plaintiff was equitably estopped to defend upon the ground of the separate "secret" agreement and that the plaintiff should not be allowed to profit from or defend upon the basis of his own wrongful act. *Id.* 315 US at 458; 62 S Ct at 680. Quite simply, a party could not defend against a claim by the FDIC for collection on a promissory note based on an agreement that was not memorialized in some fashion in the failed bank's records. *Id.* The Court noted that the federal banking statutes revealed "a federal policy to protect [the FDIC] and the public funds which it

administers against misrepresentations as to the securities in the portfolios of the banks which respondent insures or to which it makes loans." *Id.*

The doctrine was later codified in 12 USC 1823(e) of the Financial Institutions Reform, Recovery and Enforcement Act of 1989:

> (e) Agreements against interests of Corporation
>
> (1) In general
>
> No agreement which tends to diminish or defeat the interest of the Corporation in any asset acquired by it under this section or section 1821 of this title, either as security for a loan or by purchase or as receiver of any insured depository institution, shall be valid against the Corporation unless such agreement—
>
> **(A)** is in writing,
>
> **(B)** was executed by the depository institution and any person claiming an adverse interest thereunder, including the obligor, contemporaneously with the acquisition of the asset by the depository institution,
>
> **(C)** was approved by the board of directors of the depository institution or its loan committee, which approval shall be reflected in the minutes of said board or committee, and
>
> **(D)** has been, continuously, from the time of its execution, an official record of the depository institution.

The rule appears to include third party assignees and transferees. See *Federal Financial Co v Hall*, 108 F3d 46, 49 (CA 4, 1997); *FDIC v Newhart*, 892 F2d 47, 50 (CA 8, 1989) ("If holder in due course status did not run with the notes acquired by the FDIC in purchase and assumption transactions, the market for such notes would be smaller, which would have a deleterious effect on the FDIC's ability to protect the assets of failed banks.") Therefore, Commerce First, as a successor in interest to the FDIC, was entitled to the protection of the *D'Oench Duhme* doctrine.

Commerce First cites to a number of decisions supporting the notion that an agreement must meet all four of the elements set forth in § 1823(e) in order to be valid. It argues that there must be strict compliance with each. See *Langley v FDIC,* 484 US 86, 96; 108 S Ct 396, 403; 98 L Ed 2d 340 (1987). A bank's ledger card showing payments made by a borrower based on an oral agreement allowing the borrower to pay non-interest bearing monthly installments and effectively changing the original terms of the indebtedness was insufficient to satisfy the writing requirements of § 1823(e) because it failed to provide any terms, conditions, or any other aspects of an agreement, including the signatures of the parties to the agreement. *FDIC v Mr T's, Inc,* 764 F Supp 1087, 1090 (MD La 1991). Even if the ledger card was considered a "writing," there was no evidence that the new agreement was approved by the bank's directors or loan committee. *Id.* A loan guarantor's defense to an action by the FDIC on the basis of informal, unwritten arrangements and understandings between the guarantor and bank officials, but not reflected on the bank's records, was invalidated by § 1823(e). *FDIC v Powers,* 576 F Supp 1167

(ND Ill 1983). Even if an escrow agreement between the bank and the borrowers was referred to in the bank's meeting minutes, the fact that an agreement was part of a group of documents surrounding a transaction did not exempt that agreement from the categorical requirements of § 1823(e). *FDIC v Giammettei,* 34 F3d 51 (CA 2, 1994). An alleged oral agreement by a bank to support a borrower's bid to purchase a bankrupt hospital was insufficient to defeat the FDIC's claim. *FDIC V O'Neil,* 809 F2d 350 (CA 7, 1987). An obligation to cancel a mortgage that was not in writing did not comply with § 1823(e). *FDIC v Fonseca,* 795 F 2d 1102 (CA 1, 1986).

However, plaintiffs argue that neither 12 USC 1823(e) nor the *D'Oench Duhme* doctrine apply to the facts of this case because the FDIC never obtained an interest in the mortgage, citing *FDIC v Nemecek,* 641 F Supp 740 (Kan, 1986). We find *Nemecek* persuasive. In *Nemecek*, the bank brought suit against the defendants in state court to recover on an overdue mortgage. The parties eventually agreed that, in exchange for the defendants' presentation of quit claim deeds to the property, the bank would not pursue foreclosure proceedings and would not seek a deficiency on the underlying note. No formal release of liability was ever signed. Although the defendants presented the bank with the quitclaim deeds, the deeds were not in the bank's possession at the time the FDIC took over as receiver. The FDIC was substituted as the plaintiff in the state action and had the case removed to federal district court. The defendants sought to enforce the earlier settlement agreement. The FDIC argued that 12 USC 1823(e) and the *D'Oench Duhme* applied and that it was not bound by the bank's agreement, which reduced its interest in acquired assets. In granting judgment for the defendants, the district court noted that "the FDIC must first have *acquired* the asset from the failed bank. This section has no application where 'the parties contend that no asset exists or an asset is invalid and that such invalidity is caused by acts independent of any understanding or side agreement.'" *Id.* at 741-742 (emphasis in original). The district court concluded that an "accord and satisfaction" had been reached between the bank and the defendants prior to the FDIC's acquisition of any assets. "As between the Bank and the obligors, the case was considered settled despite the remaining formality of the signing of a 'release of liability.' The Bank's attorney, acting as its agent, had received the quitclaim deeds. Accordingly, the contemplated performance was completed and the case was settled. Therefore, the obligors' note with the Bank was cancelled and was not an asset which the FDIC acquired in its purchase." *Id.* at 743.

E&J obtained a loan from Excel in the amount of $1,775,000, in order to purchase the property from Moore LLC. At closing, Excel funds were used to pay off the first mortgage owned by Oakland Commerce in the amount of $1,452.983.80, as well as Loan 169 in the amount of $251,129.16. Plaintiffs were assured that title to the property would be free and clear and that upon receiving $251,129.16, Main Street Bank would consider Loan 169 fully satisfied and would discharge the debt and collateral. This was evidenced by the Loan Payoff agreement, which listed the full amount due and owing on Loan 169 and listed the collateral as "multiple." Thus, plaintiffs were third-party good-faith purchasers who reasonably relied on the information available to them. In contrast, Commerce First did not even make a cursory inquiry into at the register of deeds, where it would have certainly been aware of plaintiffs' interest in the property. The Loan Payoff Agreement, which was part of Main Street Bank's records, clearly alerted Commerce First of a potential problem. Instead of taking reasonable steps to investigate, Commerce First plowed ahead with its purchase of the loan portfolio. We believe that the Loan Payoff Agreement satisfied 12 USC 1823(e) and the *D'Oench Duhme* doctrine and that the trial court did not err in finding that plaintiffs were entitled to summary disposition.

D. VALIDITY OF THE SHERIFF'S SALE

In addition to finding that the Loan Payoff Agreement satisfies 12 USC 1823(e) and the *D'Oench Duhme* doctrine, we find further support for the outcome of this case in our recently decided case *Euihyung Kim v JP Morgan Chase Bank,* ___ Mich ___; ___ NW2d ___; (Docket No. 302528, issued January 12, 2012). As in this case, the defendant in *Kim* acquired a failed bank's loans from the FDIC as receiver. When the borrowers defaulted on their mortgage, the defendant sought to foreclose by advertisement and ultimately purchased the property at sheriff's sale. *Euihyung*, slip op p 1. The plaintiffs sought to set aside the sheriff's sale, arguing that the defendant failed to satisfy the statutory requisites to foreclose by advertisement because it failed to record its mortgage interest before the sale, as required by MCL 600.3204(3).[3] *Id.* The trial court granted summary disposition in the defendant's favor, finding that the defendant acquired its interest "by operation of law" and was, therefore, not required to record its interest before the sale. *Id.* at slip op p 3. Looking to 12 USC 1821 (authorizing receiverships for the FDIC) and 12 USC 1821(d)(2)(G) (authorizing the FDIC to dispose of the failed bank's assets), this court concluded that "it appears that the FDIC, as receiver, rather than defendant, acquired the Bank's rights, titles, powers and privileges 'by operation of law.' Defendant simply purchased the loans from the FDIC after they were transferred to the FDIC by operation of law." *Id*. at slip op p 5. This Court held:

> Therefore, pursuant to the plain language of MCL 600.3204(3), defendant was required to record its mortgage interest before the sheriff's sale. Because defendant failed to do so, it was not statutorily authorized to proceed with the sale. See MCL 600.3204(3) ("If the party foreclosing a mortgage by advertisement is not the original mortgagee, a record chain of title shall exist prior to the date of sale...." [Emphasis added]); see also Davenport v. HSBC Bank USA, 275 Mich App 344, 347–348; 739 NW2d 383 (2007) ("Because defendant lacked the statutory authority to foreclose, the foreclosure proceedings were void ab initio.") Accordingly, the trial court erred by granting summary disposition for defendant and denying plaintiffs' motion for summary disposition when they were entitled to set aside the sheriff's deed. [*Id.*]

Here, there is no record that Commerce First recorded its mortgage interest prior to the sheriff's sale. Granted, this was not an issue in the trial court. However, it appears that Commerce First relied upon the *original* mortgage executed between Main Street Bank and Moore LLC and recorded on September 10, 2007. Because Commerce First did not record its interest, *Euihyung* compels that the sheriff's deed be set aside.

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[3] MCL 600.3204(3) provides: "If the party foreclosing a mortgage by advertisement is not the original mortgagee, a record chain of title shall exist prior to the date of sale under [MCL 600.]3216 evidencing the assignment of the mortgage to the party foreclosing the mortgage.

At oral argument, Commerce First was dismissive of the notion that failure to record its interest would result in the setting aside of the Sheriff's Deed. It implied that it would simply start a new foreclosure proceeding after recording its interest. However, Commerce First fails to acknowledge Michigan's race-notice statute. Well before Commerce First obtained its interest from the FDIC, both a warranty deed and a mortgage interest in the property were filed with the register of deeds in October 2008.

Under MCL 565.29, the holder of a real estate interest who first records his or her interest generally has priority over a subsequent purchaser.

> Every conveyance of real estate within the state hereafter made, which shall not be recorded as provided in this chapter, shall be void as against any subsequent purchaser in good faith and for a valuable consideration, of the same real estate or any portion thereof, whose conveyance shall be first duly recorded. The fact that such first recorded conveyance is in the form or contains the terms of a deed of quit-claim and release shall not affect the question of good faith of such subsequent purchaser, or be of itself notice to him of any unrecorded conveyance of the same real estate or any part thereof.

Plaintiffs clearly had priority over Commerce First.

Additionally, Commerce First was not a good-faith purchaser. A good-faith purchaser is one who purchases without notice of a defect in the vendor's title. *Richards v Tibaldi*, 272 Mich App 522, 539; 726 NW2d 770 (2006), quoting *Mich Nat'l Bank & Trust Co v Morren,* 194 Mich App 407, 410; 487 NW2d 784 (1992). Notice may be actual or constructive:

> When a person has knowledge of such facts as would lead any honest man, using ordinary caution, to make further inquiries concerning the possible rights of another in real estate, and fails to make them, he is chargeable with notice of what such inquiries and the exercise of ordinary caution would have disclosed. [*Id.*, quoting *Kastle v Clemons,* 330 Mich 28, 31; 46 NW2d 450 (1951).]

Thus, constructive notice imputes upon a person all matters that are properly recorded, whether or not there is actual knowledge. *Id.* at 540. The record clearly reflects that Commerce First was well aware of the cross-collateralization of Loan 150 and Loan 169. It suspected that the property at issue had been discharged, as demonstrated by the Question and Answer exchange with DebtX in January 2009 where it sought confirmation that Loan 150 continued to be secured by the property. Commerce First followed up with a direct inquiry regarding the status of the collateral in March 2009 – *after* it had already purchased the loan portfolio from the FDIC. Had Commerce First conducted even the most rudimentary due diligence, it would have discovered plaintiffs' recorded interest in the property. Commerce First's interest in the property is defeated by the state's race-notice statute.

Affirmed. As the prevailing party, plaintiffs may tax costs. MCR 7.219.

/s/ William C. Whitbeck
/s/ Kathleen Jansen
/s/ Kirsten Frank Kelly