

STATE OF MICHIGAN
COURT OF APPEALS

KENNETH H. CORDES,

Plaintiff-Counter Defendant-
Appellee,

v

GREAT LAKES EXCAVATING &
EQUIPMENT RENTAL, INC., and JOHN J.
O'CONNOR,

Defendants-Counter Plaintiffs,

and

JBN, INC.,

Defendant-Counter Plaintiff-
Appellant,

and

MATTHEW C. O'CONNOR, CINDY K.
O'CONNOR, and HARBOR ENTERPRISES,
INC.,

Defendants.

UNPUBLISHED
June 7, 2012

No. 304003
Alpena Circuit Court
LC No. 09-003102-CZ

Before: BORRELLO, P.J., and O'CONNELL and TALBOT, JJ.

PER CURIAM.

In this mortgage dispute, plaintiff Kenneth Cordes and defendant JBN, Inc., both claim an interest in a single parcel of real property. Cordes filed an action to foreclose a mortgage on the property. JBN filed a counterclaim against Cordes, seeking a declaration that Cordes had discharged his mortgage interest on the parcel and that JBN was the owner of the parcel. The

trial court granted summary disposition in favor of Cordes. JBN now appeals by right. We affirm.¹

I. FACTS

The material facts underlying the case are undisputed. Both JBN and Cordes claim interests in a 40-acre parcel of real property in Alpena. The parties' competing interests arose from two mortgages executed by the parcel owner, Matthew O'Connor. O'Connor executed the first mortgage at issue in January 2004, in favor of Cordes.² The mortgage was recorded. Cordes executed a discharge of the mortgage, and the discharge was recorded in 2005. Cordes testified that he thought the discharge was for an equipment lien and was not for the real property parcel. Sometime after executing the discharge, Cordes was informed that there was a mistake in the discharge and that a correction would be recorded to protect Cordes' interest in the parcel. O'Connor signed an affidavit which stated that the Cordes mortgage should not have been discharged and that the mortgage remained in effect with Cordes as the lender. The affidavit was recorded in the county records in November 2005.

O'Connor executed the second mortgage at issue in 2006, in favor of Independent Bank. The mortgage was recorded. Approximately three years later, in February 2009, the bank assigned the mortgage to JBN. In April 2009, O'Connor conveyed his interest in the parcel to JBN in a deed in lieu of foreclosure. The deed was recorded in the county records.

Later in 2009, Cordes filed an action seeking to foreclose on his mortgage interest in the parcel. After some discovery, Cordes moved for summary disposition. The trial court ruled that the O'Connor affidavit nullified the discharge as between Cordes and O'Connor. The court further determined that the affidavit, as a recorded document, placed Independent Bank and JBN on notice that Cordes held an outstanding mortgage on the parcel. The court concluded,

[t]here was an enforceable mortgage as between Cordes and O'Connor, and the O'Connor affidavit rehabilitated the constructive notice of that mortgage in the land record title system prior to Independent Bank's mortgage. The bank was thus on constructive notice of the existence of the mortgage, which is superior to the bank's interest in the property. Therefore, [Cordes'] motion as to the validity of the mortgage vis-à-vis JBN Inc is GRANTED.

¹ In this opinion, references to "O'Connor" pertain to Matthew O'Connor. The other parties named in the complaint involved disputes about other parcels of property that are not at issue in this appeal.

² The mortgage also referenced two other parcels owned by O'Connor's parents, John and Cindy. Those parcels are not at issue in this appeal. At the same time the O'Connors executed the mortgage in favor of Cordes, they also executed a separate mortgage on the same parcels in favor of the Bank of Alpena. The Bank of Alpena apparently discharged the mortgage on all the parcels. The Bank of Alpena's interests are not at issue in this appeal.

The trial court subsequently dismissed JBN's counterclaim.

II. ANALYSIS

A. Standard of Review

We review de novo the trial court's ruling on the summary disposition motion. *Dancey v Travelers Prop Cas Co*, 288 Mich App 1, 7; 792 NW2d 372 (2010). "Summary disposition is appropriate under MCR 2.116(C)(10) if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003).

B. Effect of the O'Connor affidavit

Both parties cite MCL 565.451a as the controlling statute to determine the validity and effect of the O'Connor affidavit. The statute reads, in pertinent part:

An affidavit stating facts relating to any of the following matters which may affect the title to real property in this state made by any person having knowledge of the facts or by any person competent to testify concerning such facts in open court, may be recorded in the office of the register of deeds of the county where the real property is situated:

(a) Birth, age, sex, [and other demographic information] . . . of parties named in deeds, wills, mortgages and other instruments affecting real property;

(b) Knowledge of the happening of any condition or event which may terminate an estate or interest in real property;

(c) Knowledge of surveyors . . . with respect to the existence and location of monuments and physical boundaries . . . ;

(d) Knowledge of such registered surveyors reconciling conflicting and ambiguous descriptions in conveyances . . . ;

(e) Knowledge of facts incident to possession or the actual, open, notorious and adverse possession of real property; or

(f) Knowledge of the purchaser, or in the case of a corporation, of its president, vice president, secretary or other duly authorized representative acting in a fiduciary or representative capacity, of real property sold upon foreclosure or conveyed in lieu of foreclosure of a trust mortgage or deed of trust securing an issue of bonds or other evidences of indebtedness, or of any mortgage, land contract or other security instrument held by a fiduciary or other representative, as to the authority of such purchaser to purchase the real property and as to the terms and conditions upon which the real property is to be held and disposed of.

JBN essentially contends that the O'Connor affidavit had no effect because the affidavit presents information that is outside the scope of the statute. We disagree. Paragraph 2 of the affidavit presents information within the scope of subsection (b): "Knowledge of the happening of *any condition or event which may terminate an estate or interest* in real property." MCL 565.451a(b) (emphasis added). In the O'Connor affidavit, paragraph 2 reads as follows: "2. A document granting a discharge of liens for the Bank of Alpena and Kenneth H. Cordes over the premises is recorded at Liber 446, Page 53 with the Alpena County Register of Deeds."³ The Cordes discharge referenced in the affidavit plainly presented a condition that could terminate an interest in the parcel. Accordingly, the affidavit contained information within the scope of MCL 565.451a(b). To the extent that the reasoning in the unpublished opinions cited by JBN would result in a contrary conclusion, we decline to follow that reasoning. See MCR 7.125(C)(1).

JBN next argues that under MCL 565.453,⁴ the O'Connor affidavit is merely prima facie evidence that the Cordes' discharge was erroneous and that the affidavit could not effectively resurrect the recorded mortgage after the discharge was recorded. Again, we disagree. The recording statutes establish a system that enables persons to search and rely upon the public record to verify property interests. See *Savidge v Seager*, 175 Mich 47, 51-52; 140 NW 951 (1913). In this case, the recorded documents (and in particular the affidavit) were sufficient to put interested persons on notice that the parcel was encumbered by a mortgage and that Cordes' discharge of the mortgage was erroneous.

In the alternative, JBN maintains that there is a factual issue regarding the veracity of the information stated in the affidavit. JBN relies on O'Connor's deposition testimony, in which O'Connor stated that he merely signed documents as his father requested. O'Connor's testimony, however, does not negate any of the information in the affidavit. Rather, viewed in the light most favorable to JBN, the deposition testimony indicated that O'Connor lacked a full understanding of the Cordes' mortgage, the Cordes' discharge, and the affidavit acknowledging that the discharge was erroneous. Nothing in the testimony created a question of fact regarding the accuracy or validity of the information in the affidavit. Absent a genuine factual issue, the trial court properly entered summary disposition in favor of Cordes. See MCR 2.116(C)(10).

JBN last argues that the trial court erred by failing to consider whether the affidavit could reform the discharge. We disagree, because JBN's argument rests on the mistaken premise that reformation was the only valid method of negating the Cordes' discharge vis-à-vis other subsequent interests. JBN's premise misconstrues the purpose and effect of the recording statutes. "Under Michigan's recording statutes, all subsequent owners or encumbrances take

³ From the record before this Court, it appears that Alpena Deed Register Liber 446, Page 53 is solely the discharge executed by Cordes.

⁴ MCL 565.453 states:

"The affidavit, whether recorded before or after the passage of this act, may be received in evidence in any civil cause, in any court of this state and by any board or officer of the state in any suit or proceeding affecting the real estate and shall be prima facie evidence of the facts and circumstances therein contained."

subject to recorded liens, rights, or interests.” *Johnson Family Ltd Partnership v White Pines Wireless, LLC*, 281 Mich App 364, 392; 761 NW2d 353 (2008); see generally MCL 565.25.⁵ The O’Connor affidavit was duly recorded and made part of the public record. Specifically, paragraphs 3 and 4 of the affidavit informed interested persons that:

3. The document creating the discharge is erroneous in that it was intended to discharge the Bank of Alpena’s lien ONLY and *not* Kenneth H. Cordes’ lien on the property.

4. *The lien of Kenneth H. Cordes should not have been discharged.* [Emphasis added.]

Therefore, all subsequent encumbrances to the parcel were subject to the interest recorded in the affidavit, i.e., the outstanding Cordes’ mortgage. For purposes of this case, the recordation of the affidavit establishes the respective rights of Cordes and JBN to the parcel. It is not material to this case whether the affidavit was effective to reform the discharge as between Cordes and O’Connor. The trial court thus properly declined to engage in an analysis of reformation of the discharge.

Affirmed.

/s/ Stephen L. Borrello

/s/ Peter D. O’Connell

/s/ Michael J. Talbot

⁵ Our Legislature amended MCL 565.25 in 2008. The parties do not argue that the amendment affects this case.