STATE OF MICHIGAN

COURT OF APPEALS

NATIONAL CITY MORTGAGE, aka NATIONAL CITY BANK OF INDIANA, aka, PNC BANK NA,	UNPUBLISHED July 31, 2012
Plaintiff-Appellee,	
v	No. 304469 Washtenaw Circuit Court
MERCANTILE BANK OF MICHIGAN,	LC No. 10-000912-CH
Defendant-Appellant.	

Before: STEPHENS, P.J., and SAWYER and OWENS, JJ.

PER CURIAM.

In this equitable subrogation case, defendant Mercantile Bank of Michigan appeals the trial court's denial of its motion for summary disposition pursuant to MCR 2.116(C)(8), and the court's grant of plaintiff National City Mortgage, aka PNC Bank's (PNC) motion for summary disposition pursuant to MCR 2.116(I)(2). The court held that case law supported plaintiff's contention that one who originally held a first priority interest in land may equitably subrogate to first lien status if such entity paid its own first mortgage. We affirm.

This case arises out of a priority lien dispute over real property owned by Randy T. Dick and Elizabeth J. Dick in Washtenaw County (the "property"). The Dicks granted multiple mortgages on the property to PNC and to Mercantile. PNC filed a complaint against Mercantile claiming its entitlement to equitable subrogation over Mercantile's priority lien status.

On May 4, 2006, the Dicks granted a mortgage on the property in favor of PNC to secure a loan in the amount of $350,000.00. This mortgage was recorded on May 15, 2006. At the same time, the Dicks also owned and operated a business under the name Trailer Source, Inc. Mercantile provided financing for the operations of Trailer Source. In consideration for this business financing, the Dicks each provided a personal guaranty of the Trailer Source debt to Mercantile and also pledged the property to Mercantile, as security for the debt, pursuant to a Future Advance Mortgage dated March 26, 2007. The Mercantile mortgage was recorded on April 10, 2007. At the time of recording, the Mercantile mortgage was junior to the PNC mortgage.

Approximately eight months after pledging the property to Mercantile in the Mercantile mortgage, the Dicks returned to PNC to obtain additional financing. As part of the additional

financing, the Dicks executed a new note in the amount of $340,650.00 as secured by an additional mortgage on the property dated November 30, 2007. The second PNC mortgage was recorded on December 6, 2007. The proceeds of the new note were used to pay off the amount secured by the first PNC mortgage. PNC discharged the first PNC mortgage pursuant to a satisfaction of mortgage recorded December 26, 2007. .

Before the filing of PNC's Complaint, the Dicks filed a chapter 7 bankruptcy proceeding on September 21, 2009. The bankruptcy discharged the Dicks's liability to Mercantile and eliminated Mercantile's ability to collect on their individual guaranties of the Trailer Source debt. On August 19, 2010, PNC filed its complaint in this matter, requesting the court determine "in equity" that the interests of PNC in the property are superior to the interests of Mercantile.

Mercantile filed a motion for summary disposition pursuant to MCR 2.116(C)(8) and MCR 2.116(C)(10). PNC filed a motion for summary disposition pursuant to MCR 2.116(I)(2). The court granted summary disposition to PNC. Mercantile filed a motion for reconsideration, which the court denied. Mercantile now appeals.

First, Mercantile argues that the trial court erred when it denied Mercantile's motion for summary disposition under MCR 2.116(C)(8), and granted PNC's motion under MCR 2.116(I)(2). We disagree.

MCR 2.116(C)(8), provides that summary disposition will be granted when a party "has failed to state a claim on which relief can be granted." "A motion for summary disposition under MCR 2.116(C)(8) tests the legal sufficiency of the complaint and allows consideration of only the pleadings." *MacDonald v PKT Inc,* 464 Mich 322, 332; 628 NW2d 33 (2001). "All well-pleaded factual allegations are accepted as true and construed in a light most favorable to the nonmovant." *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999). Summary disposition is proper under MCR 2.116(C)(8) "only when the claim is so clearly unenforceable as a matter of law that no factual development could possibly justify a right of recovery." *MacDonald,* 464 Mich at 332.

After the parties appealed, this Court decided the case of *CitiMortgage Inc v Mortgage Electronic Registration Systems, Inc,* 295 Mich App 72, 76-77; 813 NW2d 332 (2011). *CitiMortgage* reviewed the history of equitable subrogation in Michigan, and adopted a modified version of Restatement Property, 3d, Mortgages, § 7.3, at 472–473. The Court noted that under Michigan's former race-notice recording statute the courts could only overcome the plain language of the statute when there were unusual circumstances, "such as fraud or mutual mistake", quoting *Ameriquest Mtg Co v Alton,* 273 Mich App 84, 93–94, 99–100, 731 NW2d 99 (2006), quoting *Devillers v Auto Club Ins Ass'n,* 473 Mich 562, 590, 702 NW2d 539 (2005). However, the *CitiMortgage* Court noted that in 2008, Michigan's recording statute was amended by 2008 PA 357, eliminating the former MCL 565.25(1) and (4). As a result, *CitiMortgage* concluded that *Ameriquest*, (one of the formerly seminal equitable subrogation cases in Michigan, and a case upon which Mercantile relies in its brief), was no longer controlling.

CitiMortgage is directly on point and provides a bright line rule for how to analyze this case. In order to apply *CitiMortgage*, however, we must first determine whether it may be applied retroactively. In general, judicial decisions apply retroactively, while prospective-only

application of decisions is typically reserved only for "exigent circumstances." *Trentadue v Buckler Lawn Sprinkler,* 479 Mich 378, 400; 738 NW2d 664 (2007). However, a more flexible approach is deemed to be necessary when "injustice might result from full retroactivity." *Gladych v New Family Homes, Inc.,* 468 Mich 594, 606; 664 NW2d 705 (2003). When evaluating whether a decision should be accorded full retroactive effect, the threshold question is whether the decision "clearly establishes a new principle of law," *Trentadue, supra* at 400-401; *Rowland v Washtenaw Co Rd Comm,* 477 Mich 197, 220; 731 NW2d 41 (2007), or whether the decision serves merely to clarify, extend, or interpret existing law, *Bolt v Lansing,* 238 Mich App 37, 44-45; 604 NW2d 745 (1999). In contrast, prospective-only application is deemed to be appropriate when the decision overrules "clear and uncontradicted case law," *Rowland, supra* at 221, quoting *Devillers v Auto Club Ins Ass'n,* 473 Mich 562, 487; 702 NW2d 539 (2005) (internal quotation marks omitted), or "decides an issue of first impression whose resolution was not clearly foreshadowed," *Holmes v Michigan Capital Medical Ct.,* 242 Mich App 703, 713; 620 NW2d 319 (2000).

Here, retroactive application of *CitiMortgage* is appropriate. The recording statute was amended in 2008, and this case was filed in 2010. Therefore, what made *Ameriquest* no longer controlling was the change in the law, which happened two years before this suit was filed. Furthermore, *CitiMortgage* does not establish a new principle of law, it merely utilizes the Restatement to clarify the existing law. The *CitiMortgage* court specifically stated that "caselaw on point in Michigan is consistent with Restatement Property, 3d, Mortgages, § 7.3, pp. 472–473." It also stated, "§ 7.3 of the Restatement reflects the present state of the law in Michigan."

The facts in *CitiMortgage* are very similar to the facts in the present case. The issue in *CitiMortgage* was, as between the two lienholders, which of the two mortgage liens is superior and whether CitiMortgage could place its lien in first priority over MERS's lien through application of the doctrine of equitable subrogation. The trial court held that CitiMortgage was not entitled to equitable subrogation. This Court reversed and remanded to the trial court for a factual determination about the equities of the case.

The *CitiMortgage* Court adopted a modified version of the Restatement Property, 3d, Mortgages, § 7.3, pp. 472–473, which states:

> (a) If a senior mortgage is released of record and, as part of the same transaction, is replaced with a new mortgage, the latter mortgage retains the same priority as its predecessor, except
>
> > (1) to the extent that any change in the terms of the mortgage or the obligation it secures is materially prejudicial to the holder of a junior interest in the real estate, or
> >
> > (2) to the extent that one who is protected by the recording act acquires an interest in the real estate at a time that the senior mortgage is not of record.
>
> (b) If a senior mortgage or the obligation it secures is modified by the parties, the mortgage as modified retains priority as against junior interests in the real estate,

> except to the extent that the modification is materially prejudicial to the holders of such interests and is not within the scope of a reservation of right to modify as provided in Subsection (c).
>
> (c) If the mortgagor and mortgagee reserve the right in a mortgage to modify the mortgage or the obligation it secures, the mortgage as modified retains priority even if the modification is materially prejudicial to the holders of junior interests in the real estate, except as provided in Subsection (d).
>
> (d) If a mortgage contains a reservation of the right to modify the mortgage or the obligation as described in Subsection (c), the mortgagor may issue a notice to the mortgagee terminating that right. Upon receipt of the notice by the mortgagee, the right to modify with retention of priority under Subsection (c) becomes ineffective against persons taking any subsequent interests in the mortgaged real estate, and any subsequent modifications are governed by Subsection (b). Upon receipt of the notice, the mortgagee must provide the mortgagor with a certificate in recordable form stating that the notice has been received.

The *CitiMortgage* Court noted:

> Of particular note, comment b to this section of the Restatement provides that "[u]nder § 7.3(a) a senior mortgagee that discharges its mortgage of record and records a replacement mortgage does not lose its priority as against the holder of an intervening interest unless that holder suffers material prejudice." *Id.* at 474. The associated Reporters' Note, voluminously citing to many cases from other jurisdictions, explains that " [c]ourts routinely adhere to the principle that a senior mortgagee who discharges its mortgage of record and takes and records a replacement mortgage, retains the predecessor's seniority as against intervening lienors unless the mortgagee intended a subordination of its mortgage or 'paramount equities' exist." *CitiMortgage*, 295 Mich App at 77, quoting Restatement Property, 3d, Mortgages, § 7.3, p. 483.

The *CitiMortgage* court then limited the application of the Restatement to cases in which the senior mortgagee discharges its mortgage of record and contemporaneously takes a replacement mortgage, as often occurs in the context of refinancing. The Court then cautioned that "the lending mortgagee seeking subrogation and priority over an intervening interest relative to its newly recorded mortgage *must be the same lender* that held the original mortgage before the intervening interest arose." *Id*. at 77. Then the court noted that "any application of equitable subrogation is subject to a careful examination of the equities of all parties and potential prejudice to the intervening lienholder." *Id.*

Finally, the *CitiMortgage* Court concluded:

> We conclude that equitable subrogation is available to place a new mortgage in the same priority as a discharged mortgage if the new mortgagee was the original mortgagee and the holders of any junior liens are not prejudiced as a consequence. We further conclude that the Restatement, in the limited form in which we have

> adopted it, sets forth a reasonable and proper framework for determining whether junior lienholders have been prejudiced and whether the equities ultimately favor equitable subrogation. *Id*. at 81.

The facts of the present case are nearly identical to the facts in *CitiMortgage*. Here, PNC is a lending mortgagee seeking subrogation and priority over Mercantile's intervening interest relative to its newly recorded mortgage. PNC is the same lender that held the original mortgage before the intervening interest arose. Therefore, PNC clearly had a cause of action for equitable subrogation, and as a result, the trial court properly declined to grant Mercantile's motion for summary disposition under MCR 2.116(C)(8).

Mercantile also argues that even if this Court finds that PNC has stated a valid cause of action for equitable subrogation, this Court should remand this case to the trial court to permit Mercantile an opportunity for factual discovery to establish the equities in its favor. We disagree.

In addition to filing its motion for summary disposition under MCR 2.116(C)(8), Mercantile also filed its motion under MCR 2.116(C)(10), arguing that there was no genuine issue as to any material fact. Indeed, several places in the record indicate that Mercantile asserted that all factual issues were resolved. Furthermore, it attached materials outside the pleadings to its motion for summary disposition. It is disingenuous for Mercantile to now assert that the trial court erred by not allowing more discovery. Additionally, based on documents produced by Mercantile, there is no issue of fact regarding the equities in this case. *CitiMortgage* specifically states:

> We further conclude that the Restatement, in the limited form in which we have adopted it, sets forth a reasonable and proper framework for determining whether junior lienholders have been prejudiced and whether the equities ultimately favor equitable subrogation. *CitiMortgage,* 295 Mich App at 81.

Based on the framework outlined in § 7.3 of the Restatement, the equities clearly favor PNC. Mercantile's internal loan file documents establish that Mercantile never relied upon a first lien position. The documents produced by Mercantile in response to PNC's request indicate that Mercantile was fully aware of PNC's refinance mortgage. The analyses performed by Mercantile's employees indicate that Mercantile always believed itself to be in the second lien position. In fact, after PNC's recorded refinance mortgage, Mercantile reduced its loan amount by $100,000, after determining that the value of its collateral had diminished.

Our Supreme Court has noted that "[t]he theory of equitable or conventional subrogation is that the junior lienor's position is left unchanged by the conduct of the party seeking subrogation and that he is not wronged any by permitting subrogation." *Lentz v Stoflet,* 280 Mich 446, 451; 273 NW 763 (1937). Here, Mercantile's position was not changed, it always believed itself to be in the second position, and it has not demonstrated that it would suffer any prejudice by remaining in that position.

Affirmed.

/s/ Cynthia Diane Stephens
/s/ David H. Sawyer
/s/ Donald S. Owens