STATE OF MICHIGAN

COURT OF APPEALS

MB FINANCIAL BANK, N.A.,

Plaintiff-Appellant,

v

JOHN W. THORN and LINDA THORN HOFFMAN,

Defendants-Appellees,

and

LML OF FOUNTAIN SQUARE, L.L.C.,

Defendant.

UNPUBLISHED
September 18, 2012

No. 306672
Berrien Circuit Court
LC No. 2011-000118-CK

Before: WILDER, P.J., and O'CONNELL and K. F. KELLY, JJ.

PER CURIAM.

In this equitable subrogation action, plaintiff MB Financial Bank, N.A. (MB Financial), appeals as of right from the trial court's judgment in favor of defendants John W. Thorn and Linda Thorn Hoffman and holding that a 2004 mortgage executed in favor of the Thorns has priority over a 2009 construction mortgage executed by defendant LML of Fountain Square, L.L.C. (LML), in favor of MB Financial. The judgment was entered after the trial court denied MB Financial's motion for summary disposition pursuant to MCR 2.116(C)(10) and granted summary disposition in favor of the Thorns pursuant to MCR 2.116(I)(2). We affirm.

We review de novo a ruling on a motion for summary disposition. *Walgreen Co v Macomb Twp*, 280 Mich App 58, 62; 760 NW2d 594 (2008). "A motion for summary disposition under MCR 2.116(C)(10) should be granted if there is no genuine issue of material fact when the evidence and all reasonable inferences therefrom are viewed in the light most favorable to the nonmoving party; in that circumstance, the moving party is entitled to judgment as a matter of law." *Id.* "Under MCR 2.116(I)(2), the court may enter a judgment in favor of the opposing party if it appears that the opposing party is entitled to judgment." *Id.*

MB Financial first argues that the trial court erred in determining that it was a mere volunteer and, as such, equitable subrogation was unavailable to it. The "mere volunteer" rule

"provides that equitable subrogation may not be extended to a party that is a mere volunteer, i.e., one who pays the mortgage but has no interest in the land." *CitiMortgage, Inc v Mtg Electronic Registration Sys, Inc*, 295 Mich App 72, 80; 813 NW2d 332 (2011). Underlying the trial court's rejection of MB Financial's equitable subrogation argument was its conclusion that MB Financial was a mere volunteer. The trial court relied in part on *Ameriquest Mtg Co v Alton*, 273 Mich App 84; 731 NW2d 99 (2006), to support its application of the mere volunteer rule to preclude MB Financial from seeking equitable subrogation. However, after the trial court issued its opinion and order in August 2011, this Court concluded in *CitiMortgage*, 295 Mich App at 75, that *Ameriquest* "is no longer controlling" because its analysis relied on Michigan's former race-notice recording statute, MCL 565.25(1) and (4), which was eliminated by 2008 PA 357. In *CitiMortgage*, this Court held that "the 'mere volunteer' rule has no applicability when the new mortgagee was also the original mortgagee." *Id*. at 81. Here, MB Financial's predecessor, New Century Bank (NCB), was both the original mortgagee and the new mortgagee. Accordingly, the mere volunteer rule is inapplicable to the circumstances of this case and is unavailable to preclude MB Financial, as NCB's successor in interest, from seeking equitable subrogation.[1]

MB Financial next argues that the trial court erred by failing to limit its analysis to the issue whether the new mortgagee was also the holder of the mortgage being paid off. This Court has held that "bolster of priority may be applicable where the new mortgagee is the holder of the mortgage being paid off or where the proceeds of the new mortgage are necessary to preserve the property from foreclosure or another action that would cause the intervening lien holders to lose their security interests." *Washington Mut Bank FA v ShoreBank Corp*, 267 Mich App 111, 128; 703 NW2d 486 (2005). Here, as the trial court observed, it was undisputed that the proceeds of the 2009 mortgage were used to satisfy a prior 2007 mortgage, both of which were held by NCB. In addition, under the terms of the 2007 mortgage, NCB could have advanced up to $15,000,000 to protect its interest in the property and avoid foreclosure. Thus, the trial court concluded that the proceeds of the 2009 mortgage were not necessary to preserve the property from foreclosure and, as such, NCB was a mere volunteer.

MB Financial does not dispute the trial court's finding that the proceeds of the 2009 mortgage were used to satisfy the 2007 mortgage. MB Financial argues, however, that the trial court should not have focused on the fact that the proceeds from the 2009 mortgage were unnecessary to preserve the property from foreclosure, making NCB a mere volunteer to whom equitable subrogation is unavailable. We agree with MB Financial that it was unnecessary for the trial court to consider whether the proceeds of the new mortgage were necessary to preserve the property from foreclosure. Under the plain language of *Washington Mut Bank*, 267 Mich App at 129, bolstering of priority may be applicable where (1) the new mortgagee is the holder of the mortgage being paid off, or (2) where the proceeds of the new mortgage are necessary to

[1] MB Financial alternatively argues that, even if the mere volunteer rule does apply, it was not a mere volunteer and therefore is not barred from equitable subrogation. MB Financial relatedly argues that the trial court erred in holding that it was a per se mere volunteer because it is a sophisticated financial institution. However, because the mere volunteer rule is inapplicable to the circumstances of this case, it is unnecessary to address these alternative arguments.

preserve the property from foreclosure. Because NCB was the holder of the mortgage being paid off, the trial court was free to consider whether bolstering of priority was applicable regardless of whether the proceeds of the new mortgage were necessary to preserve the property from foreclosure. "[E]quitable 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." *CitiMortgage*, 295 Mich App at 81. Accordingly, whether equitable subrogation is available involves a two-part inquiry: (1) whether the new mortgagee was the original mortgagee, and (2) whether the holders of any junior liens are prejudiced as a consequence. *Id*. It is undisputed that NCB was the original mortgagee. Therefore, it is necessary to determine whether the Thorns would be prejudiced if equitable subrogation is applied in this case.

MB Financial argues that the Thorns will not suffer prejudice if their mortgage interest is subordinated to its mortgage interest. MB Financial argues that there is no prejudice because the Thorns intended that their interest would be subordinate, given that the Thorns agreed to subordinate their interest to the 2007 future advance mortgage which had a $15,000,000 limit, and that the Thorns' interest is at least subordinate to the amount of the 2007 mortgage. This Court has determined that the Restatement of Property, 3d, Mortgages, § 7.3, pp 472-473, "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 76-77, 81. The Restatement provides, in relevant part:

> (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
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> (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.
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> (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). [Restatement Property, 3d, Mortgages, § 7.3, pp 472-473.]

In *CitiMortgage*, 295 Mich App at 77, this Court stated that "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.'" This Court quoted the associated Reporters' Note, which 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.'" *Id*., quoting Restatement Property, 3d, Mortgages, § 7.3, p 483. This Court adopted § 7.3 of the Restatement in "cases in which the senior mortgagee discharges its mortgage of record and contemporaneously takes a replacement mortgage." *Id*. This Court cautioned, however, "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; and, furthermore, 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*.

In this case, NCB held the senior mortgage due to the Thorns' subordination agreement, both in 2005 and in 2007. However, its senior mortgage was released of record and, as part of the same transaction, was replaced with a new mortgage. Thus, under the Restatement, § 7.3(a)(1), NCB's mortgage would retain the same priority as its predecessor mortgage, except to the extent that any change in the terms of the mortgage or the obligation it secures is materially prejudicial to the Thorns, as holder of a junior interest in the real estate. In this case, the terms of the mortgage are materially prejudicial to the Thorns, because the Thorns conditioned any further subordination upon a transfer agreement memorializing specific transfer dates of specific commercial exchange units and exclusive parking spaces.

On the date scheduled for closing, the Thorns' counsel advised LML's general counsel that the transfer agreement still needed to be completed. The Thorns' counsel specifically stated that closing was not authorized until the parking space issue was resolved and the transfer agreement was finalized. The Thorns' counsel also provided an escrow instruction letter to the title insurance company stating that closing should only occur upon satisfaction of several requirements, including verification that the transfer agreement was duly executed. The subordination agreement was not to be effective unless the transfer agreement was also signed. The closing went forward, but LML never completed and signed the transfer agreement. Because of LML's failure to meet the conditions required by the Thorns in exchange for subordination, a valid subordination agreement never arose. Thus, the Thorns had senior mortgage priority.

Even though "'[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,'" this case involves a situation in which "'paramount equities' exist." *CitiMortgage*, 295 Mich App at 77, quoting Restatement Property, 3d, Mortgages, § 7.3, p 483. It would be wholly inequitable for NCB (and its successor in interest, MB Financial) to retain seniority when LML failed to meet the conditions expressly required by the Thorns in exchange for subordination. The Thorns subordinated their interest on two prior occasions, but made the third subordination contingent on LML's completion of, and signature on, the transfer agreement. That condition was never satisfied.

This Court will not reverse if the right result is reached, albeit for the wrong reason. *Coates v Bastian Bros, Inc*, 276 Mich App 498, 508-509; 741 NW2d 539 (2007). In this case, the trial court analyzed the case under the framework of Michigan's former race-notice recording statutes and case law relying on those statutes, which is no longer controlling. The trial court determined that equitable subrogation was unavailable to MB Financial (as NCB's successor in

interest) because NCB was a mere volunteer and a sophisticated financial institution. However, this Court held in *CitiMortgage*, 279 Mich App at 81, that equitable subrogation may be 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.

Viewing the undisputed evidence and all reasonable inferences therefrom in the light most favorable to the Thorns, there is no genuine issue of material fact that the equities in this case do not favor equitable subrogation. The Thorns expressly declined to agree to subordination unless LML completed and signed the transfer agreement. LML failed to fulfill the conditions necessary to validate the Thorns' agreement to subordinate. The Thorns should not be penalized for LML's failure to finalize the transfer agreement, and MB Financial should not be able to reap the benefit of the mistaken closing. The conditions precedent to the Thorns' subordination agreement did not occur. As such, the Thorns properly have senior priority, and equity does not favor employing equitable subrogation to elevate MB Financial to senior priority. The trial court did not err in granting judgment in favor of the Thorns.

Affirmed.

/s/ Kurtis T. Wilder
/s/ Peter D. O'Connell
/s/ Kirsten Frank Kelly