STATE OF MICHIGAN

COURT OF APPEALS

AMERIQUEST MORTGAGE COMPANY, Plaintiff-Appellee, v ARKAN D. ALTON, Defendant-Appellant.	FOR PUBLICATION November 28, 2006 9:05 a.m. No. 264213 Oakland Circuit Court LC No. 04-058731-CH
ARKAN D. ALTON, Plaintiff-Appellant, v AMERIQUEST MORTGAGE COMPANY, Defendant-Appellee.	No. 264214 Oakland Circuit Court LC No. 04-058944-CH Official Reported Version

Before: Fitzgerald, P.J., and Murphy, Talbot, Meter, Fort Hood, Schuette, and Borrello, JJ.

TALBOT, J.

Pursuant to MCR 7.215(J), this Court convened a special panel to resolve the purported conflict between this Court's ruling in the consolidated cases comprising *Ameriquest Mortgage Co v Alton*, 271 Mich App 660; 726 NW2d 424 (2006), vacated in part 271 Mich App 801 (2006), and *Washington Mut Bank, FA v ShoreBank Corp*, 267 Mich App 111; 703 NW2d 486 (2005). This matter is being decided without oral argument pursuant to MCR 7.214(E). We conclude that *Washington Mut Bank* was correctly decided and affirm the ruling in *Ameriquest.*

I. *Ameriquest*—Factual History and Holding

The consolidated cases in *Ameriquest* arise from competing claims to quiet title to residential property. Samir Yousif obtained a loan from Franklin Funding in exchange for a $255,000 mortgage on the subject property. This mortgage was recorded on March 11, 2002. Subsequently, Yousif obtained a separate loan from Arkan D. Alton in exchange for an $86,000 mortgage on the same property. Alton recorded his mortgage on March 21, 2003. Alton

acknowledged he was aware of Franklin's preexisting mortgage on the property at the time of his loan to Yousif.

Shortly thereafter, falsely representing that no encumbrances other than the Franklin mortgage existed on the property, Yousif obtained a loan from Ameriquest in the amount of $294,300 secured by the property. The Ameriquest mortgage was recorded on May 1, 2003. The funds provided by Ameriquest were used to pay off the mortgage from Franklin Funding,[1] and a certificate of discharge of the Franklin mortgage was recorded on September 18, 2003. Although Ameriquest did perform a title search before providing the loan to Yousif and receiving a title commitment, the Alton mortgage was not discovered.

Yousif ultimately defaulted on both the Alton and Ameriquest mortgages. Alton foreclosed via advertisement. A sheriff's sale was conducted September 2, 2003, and Alton purchased the property for $92,863.42, recording the sheriff's deed on September 9, 2003. Appraisals of the subject property indicate valuations ranging from approximately $300,000 to $327,000. In June 2004, Alton and Ameriquest filed separate declaratory actions in the Oakland Circuit Court, which were later consolidated, to quiet title. Both Alton and Ameriquest filed motions for summary disposition. Ameriquest, asserting the applicability of the doctrine of equitable subrogation, argued that it was entitled to assume the priority position of Franklin Funding because its monies had been used to pay off the first mortgage. Ameriquest further argued that should Alton prevail, he would receive a windfall by gaining possession of a property valued at $300,000 or more for his loan of $86,000, and that Ameriquest would lose all the funds loaned to pay off the first priority mortgage previously held by Franklin Funding. Alton asserted that Ameriquest had acted as a volunteer in paying off the Franklin mortgage and that Ameriquest's mortgage was eliminated by the foreclosure proceedings. On July 19, 2005, the circuit court entered an order granting summary disposition in favor of Ameriquest and denying Alton's motion, determining that Ameriquest would be prejudiced if its claim were extinguished, but that granting relief to Ameriquest would not extinguish the title that Alton had received through the sheriff's sale.

On appeal, this Court, stating that it was compelled to follow the ruling in *Washington Mut Bank*, reversed the decision of the trial court on the ground that Ameriquest's status as a volunteer precluded its entitlement to the benefit of equitable subrogation. Referencing *Washington Mut Bank*, this Court stated, in relevant part: "[T]he doctrine of equitable subrogation does not apply to permit a new mortgage, granted as part of a generic refinancing transaction, to take the priority of the original mortgage, which is being paid off, thereby giving the new mortgage priority over intervening liens." *Ameriquest*, *supra* at 665. This Court indicated that, were it not constrained by the prior holding of *Washington Mut Bank*, it would affirm the trial court's ruling and adopt the position of the Restatement of Property (Mortgages), 3d (the Restatement), which would permit the application of the doctrine of equitable

[1] The Franklin mortgage was, at some point, assigned to Popular Financial Services, being serviced by Equity One. The payoff amount remitted by Ameriquest to Equity One on March 24, 2003, totaled $241,337.51.

subrogation in "circumstances of a refinanced mortgage." *Ameriquest, supra* at 661-662. Noting that the Restatement did not adopt a strict volunteer rule, the Court indicated that the Restatement rule, which views subrogation as an equitable remedy to avoid "'unearned windfall[s] and "'unjust enrichment,'" comprised "the better view." *Id.* at 667-668, quoting the Restatement § 7.6, comment a, p 509, and p 508. The Court focused on the fact that Ameriquest, in paying off the Franklin mortgage, was following the instructions of Yousif, and, thus, protecting its own security interest in the property. See *id.* at 673. Reviewing the historical preclusion of subrogation in caselaw under the volunteer rule, the Court observed that the Restatement would permit the use of subrogation in the circumstances presented, opining:

> Because the holding of *Washington Mut Bank* establishes an inflexible rule precluding the application of equitable subrogation in mortgage refinancing, we find it contrary to the principles of equity the doctrine is intended to promote. Although *Washington Mut Bank* recognizes the possibility of equitable subrogation if the replacement loan is provided by the holder of the old mortgage, or if the new lender first purchased the prior mortgage and then accepted the new mortgage, *Washington Mut Bank* does not appear to permit an exception in this case despite the inequitable result. Existing Michigan law concerning equitable subrogation in the context of mortgage refinancing is confusing at best, and is contrary to logic, the Restatement of Property, and the view in many jurisdictions. These circumstances merit further consideration.
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> Should the volunteer rule of *Washington Mut Bank* be found to be a proper interpretation of *Lentz*,[2] we urge the Michigan Supreme Court to review and reconsider this precedent in light of the prevailing modern view reflected in the Restatement. . . . Where the equities are in favor of the payor mortgagee, we believe this rule should prevail. Given the common practice of mortgage refinancing and the sheer volume of transactions undertaken, equitable subrogation is a proper and necessary mechanism for resolving priority disputes to avoid injustice. [*Ameriquest, supra* at 683-684 (internal citation omitted).]

II. *Washington Mut Bank*—Factual History and Holding

Hanna and Jaklin Shina received a $392,000 loan secured by a mortgage in favor of Option One Mortgage on property they owned in West Bloomfield, Michigan. The Shinas refinanced this property by securing a mortgage from Washington Mutual Bank in the amount of $392,000, which they used to satisfy and discharge the mortgage held by Option One. However, Washington Mutual Bank was unaware that two additional mortgages had previously been recorded against the subject property: one by ShoreBank, in the amount of $200,000, and one by Standard Federal Bank, in the amount of $249,000. *Washington Mut Bank, supra* at 112.

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[2] *Lentz v Stoflet*, 280 Mich 446; 273 NW 763 (1937).

Following default by the Shinas, the property was placed in foreclosure. Washington Mutual Bank asserted its right to be equitably subrogated to the priority position of Option One because the proceeds of its loan had been used to satisfy and discharge the Option One mortgage. The trial court did not agree, and granted summary disposition in favor of ShoreBank and Standard Federal Bank because Washington Mutual Bank had no legal obligation to pay off the Option One mortgage and, as a volunteer, lacked entitlement to equitable subrogation. *Id.* at 112-113.

On appeal, this Court reviewed Michigan law and determined that two prior Supreme Court cases, *Lentz v Stoflet*, 280 Mich 446; 273 NW 763 (1937), and *Walker v Bates*, 244 Mich 582; 222 NW 209 (1928), were irreconcilable. Although both *Walker* and *Lentz* involve the applicability of the doctrine of equitable subrogation and the status of a volunteer, their outcomes are viewed as inconsistent. In *Walker*, the plaintiffs, one of which was a real estate syndicate, were granted a lien on the subject property. Commonwealth Federal Bank had provided the homeowners a subsequent mortgage that had been used to discharge the senior mortgage. The *Walker* Court concurred that Commonwealth Federal Bank should be equitably subrogated to a priority position over plaintiffs' lien on the basis of their discharge of the senior mortgage. *Walker, supra* at 586-587. In contrast, in *Lentz* the plaintiffs were denied equitable subrogation on the basis of their volunteer status and a determination that they maintained no interest to protect. *Lentz, supra* at 451.

Citing its obligation to follow the most recent pronouncement by the Michigan Supreme Court, the Court in *Washington Mut Bank* determined that its decision should be governed by *Lentz*, and stated:

> The most recent pronouncement of the Supreme Court on this topic would certainly seem to be that the doctrine of equitable subrogation does not allow a new mortgagee to take the priority of the older mortgagee merely because the proceeds of the new mortgage were used to pay off the indebtedness secured by the old mortgage. It is clear to us that, under *Lentz*, plaintiff is a mere volunteer and, therefore, is not entitled to equitable subrogation. [*Washington Mut Bank, supra* at 119-120.]

Viewing *Walker* as an anomaly, the Court ruled in relevant part:

> [W]e are unaware of any authority regarding the application of the doctrine of equitable subrogation to support the general proposition that a new mortgage, granted as part of a generic refinancing transaction, can take the priority of the original mortgage, which is being paid off, giving it priority over intervening liens. . . . Such bolstering 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, supra* at 128.]

In light of the absence of such factual predicates in the circumstances presented, the Court determined that the plaintiff was not entitled to subrogation of the original mortgage and, thus, should not "receive priority over the intervening lienholders." *Id.*

III. Statement of the Issue and Standard of Review

The conflict presented concerns whether the doctrine of equitable subrogation may be applied to grant the priority lien position of a prior lender to a mortgagee that loans money to finance a subsequent mortgage on real property, thereby giving the mortgagee a position superior to that held by an intervening junior mortgagee. This Court reviews equitable actions to quiet title de novo. *Burkhardt v Bailey*, 260 Mich App 636, 646; 680 NW2d 453 (2004). A trial court's determination pertaining to a motion for summary disposition is also reviewed de novo. *MacDonald v PKT, Inc*, 464 Mich 322, 332; 628 NW2d 33 (2001). Finally, this Court reviews the underlying issue of statutory construction de novo, *Eggleston v Bio-Medical Applications of Detroit, Inc*, 468 Mich 29, 32; 658 NW2d 139 (2003), because it involves the application of the law, i.e., the race/notice statutes, to undisputed facts regarding the recordation of mortgages.

IV. Analysis

Michigan is a recording priority jurisdiction.[3] A mortgage is clearly a conveyance within the meaning of the recording acts. MCL 565.35; *Stover v Bryant & Detwiler Improvement Corp of Detroit*, 329 Mich 482, 484; 45 NW2d 364 (1951). Accordingly, MCL 565.25 provides, in relevant part:

> (1) . . . In the entry book of mortgages the register shall enter all mortgages and other deeds intended as securities, and all assignments of any mortgages or securities.
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> (4) The instrument shall be considered as recorded at the time so noted and shall be notice to all persons except the recorded landowner subject to subsection (2), of the liens, rights, and interests acquired by or involved in the proceedings. All subsequent owners or encumbrances shall take subject to the perfected liens, rights, or interests.

In conformity with this statutory language, "[m]ortgages are subjected to the satisfaction of the obligation on the mortgage note in the order in which they are recorded." *Mitchell v Trustees of United States Mut Real Estate Investment Trust*, 144 Mich App 302, 314; 375 NW2d 424 (1985). The recordation of a mortgage constitutes constructive notice to all subsequent lienholders regarding both the existence of the mortgage and the amount of indebtedness that is secured. *McMurtry v Smith*, 320 Mich 304, 306-307; 30 NW2d 880 (1948).

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[3] Michigan's status as a recording priority jurisdiction has existed since, at least, 1897 CL 8980.

If statutory language is unambiguous, appellate courts must presume that the Legislature intended the plainly expressed meaning, and any further judicial construction is precluded. *DiBenedetto v West Shore Hosp*, 461 Mich 394, 402; 605 NW2d 300 (2000). The mandate expressed in MCL 565.25(4) is clear: recordation of a mortgage charges third parties with constructive notice and serves to determine lien priority. Accordingly, a properly recorded mortgage is notice to all subsequent purchasers that they take subject to any lien the mortgagor may have on the property whether the record has been examined or not. *Piech v Beaty*, 298 Mich 535, 538; 299 NW 705 (1941). There can be no dispute, given the statutory language, that Alton's mortgage, having been first recorded, has priority over Ameriquest's mortgage. The failure of Ameriquest's title-insurance commitment to discover Alton's duly recorded prior mortgage does not serve to nullify the constructive notice provided by the recordation or to alter the priority status of Alton's mortgage. See *Lewis v Hook*, 18 Mich App 405, 409; 171 NW2d 221 (1969).

Despite the mandate of MCL 565.25(4), Ameriquest contends that its mortgage is entitled to priority over Alton's under the doctrine of equitable subrogation. Ameriquest asserts that it is entitled to the rights of the prior mortgagee, Franklin Funding, because its loan was used to discharge this first mortgage. The Michigan Supreme Court has defined equitable subrogation as "'a legal fiction through which a person who pays a debt for which another is primarily responsible is substituted or subrogated to all the rights and remedies of the other.'" *Hartford Accident & Indemnity Co v Used Car Factory, Inc*, 461 Mich 210, 215; 600 NW2d 630 (1999), quoting *Commercial Union Ins Co v Medical Protective Co*, 426 Mich 109, 117; 393 NW2d 479 (1986) (opinion of Williams, C.J.). In accordance with the tenets of this doctrine, a subrogee can acquire no greater rights than those possessed by the subrogor, and the subrogee may not be a "mere volunteer." *Hartford Accident & Indemnity Co, supra* at 215; *Lentz, supra* at 449-450. In order to be entitled to subrogation, a subrogee cannot voluntarily have made payment, but rather must have done so in order to fulfill a legal or equitable duty owed to the subrogor. *Beaty v Herzberg & Golden, PC*, 456 Mich 247, 254-255, 258; 571 NW2d 716 (1997).

Equitable subrogation has been further described as "a flexible, elastic doctrine of equity" requiring that "[i]ts application should and must proceed on the case-by-case analysis characteristic of equity jurisprudence." *Hartford Accident & Indemnity Co, supra* at 215. A proviso exists that equitable subrogation "will not be enforced where it will work injustice to the rights of those having equal equities." *Bd of Co Rd Comm'rs of Calhoun Co v Southern Surety Co*, 216 Mich 528, 533; 185 NW 755 (1921) (quotation and citation omitted). It is also well established that an equitable doctrine "cannot be used to avoid the dictates of a statute, absent fraud, accident, or mistake." *Burkhardt, supra* at 659.

Subrogation has been described as taking two distinct forms:

> The doctrine of subrogation rests upon the equitable principle that one who, in order to protect a security held by him, is compelled to pay a debt for which another is primarily liable, is entitled to be substituted in the place of and to be vested with the rights of the person to whom such payment is made, without agreement to that effect. This doctrine is sometimes spoken of as "legal subrogation," and has long been applied by courts of equity. *Stroh* v. *O'Hearn*, 176 Mich. 164, 177 [142 NW 865 (1913)]. There is also what is known as

> "conventional subrogation." It arises from an agreement between the debtor and a third person whereby the latter, in consideration that the security of the creditor and all his rights thereunder be vested in him, agrees to make payment of the debt in order to relieve the debtor from a sacrifice of his property due to an enforced sale thereof. It is wholly independent of any interest in the property which the lender may have to protect. It does not, however, inure to a mere volunteer who has no equities which appeal to the conscience of the court. [*French v Grand Beach Co*, 239 Mich 575, 580-581; 215 NW 13 (1927).]

Historically, a "mere volunteer" has consistently been precluded from invoking the doctrine to attain a more favorable position of priority than that afforded by the order in which the instrument or mortgage was recorded. Very early on, the Michigan Supreme Court opined that payment of a debt by a third party, standing alone, "could hardly constitute an interest in the real estate; the right of a mere volunteer, showing no interest in the land, to pay off the mortgage, could hardly be deemed a valuable right." *Smith v Austin*, 9 Mich 465, 481 (1862). This standard was repeated in *Kelly v Kelly*, 54 Mich 30, 47; 19 NW 580 (1884), in which, because of the defendant's lack of a relationship to the subject property, defendant was deemed a stranger to the title and, therefore, could not, by the payment of either the entirety or a portion of the mortgage, become subrogated to the rights of the mortgagee. This concept was again adopted in *Desot v Ross*, 95 Mich 81; 54 NW 694 (1893), when the Court stated:

> It is only in cases where the person advancing money to pay the debt of a third party stands in the situation of a surety, or is compelled to pay it to protect his own rights, that a court of equity substitutes him in the place of the creditor as a matter of course, without any agreement to that effect. In other cases the demand of a creditor which is paid with the money of a third person, and without any agreement that the security shall be assigned to kept on foot for the benefit of such third person, is absolutely extinguished. [*Id.* at 83-84 (quotation and citation omitted).]

This long-standing precedent continued in *Lentz, supra* at 450, where the Court quoted, with approval, the following standard from *Stroh, supra* at 177: "Subrogation is an equitable doctrine depending upon no contract or privity, and proper to apply whenever persons other than mere volunteers pay a debt or demand which in equity and good conscience should have been satisfied by another." This distinction, that a "mere volunteer" is not entitled to equitable subrogation, has continued to be recognized and consistently applied through subsequent cases, including *Washington Mut Bank, supra* at 128, in which this Court, impliedly deferring to the statutory mandate regarding lien priority, stated:

> [W]e are unaware of any authority regarding the application of the doctrine of equitable subrogation to support the general proposition that a new mortgage, granted as part of a generic refinancing transaction, can take the priority of the original mortgage, which is being paid off, giving it priority over intervening liens. . . . Such bolstering 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.

Hence in this case, consistent with both longstanding precedent and the strictures imposed by statute, there exist no conditions or circumstances to warrant application of the equitable subrogation doctrine to permit Ameriquest to circumvent the established priority of Alton's mortgage and to assume the position of the prior recorded lien of Franklin Funding. Ameriquest is a mere volunteer because it had no preexisting interest in the property and did not attempt to protect its interest in the property or to revive or obtain an assignment of the original mortgage. See *Schanhite v Plymouth United Savings Bank*, 277 Mich 33; 268 NW 801 (1936). As such, Ameriquest was under no legal or equitable duty to Yousif to undertake the refinancing.

More importantly, "[i]t is only to prevent fraud and subserve justice that equity engrafts the wholesome provisions of subrogation or of equitable lien upon a transaction . . . ." *Kelly, supra* at 47. Although Ameriquest contends that the owner of the subject property, Yousif, falsely informed it that no liens existed other than that belonging to Franklin Funding at the time Ameriquest granted the mortgage, Ameriquest has not alleged any wrongdoing on the part of Alton to support the intervention of equity. Further, because Ameriquest is charged with constructive notice of Alton's earlier recorded mortgage, it is not entitled to equitable subrogation.

Finally, the *Ameriquest* Court suggests that the application of the doctrine of equitable subrogation advocated by the Restatement to preclude what the Restatement calls "an unearned windfall" constitutes the "better view." *Ameriquest, supra* at 667-668, citing Restatement Property (Mortgages), 3d, § 7.6, comment a. Acknowledging that "the rules of the Restatement are not necessarily coincident with the law of this state," the Court sought to reconcile "the extent to which the Restatement view is reflective of our state's jurisprudence." *Ameriquest, supra* at 668669. Following a review of prior case law, the Court opined that, consistent with rulings in other jurisdictions and the adoption by the Restatement of a more encompassing definition of the term "volunteer," the equities favored Ameriquest's substitution in priority. *Id.* at 680. In addition, the Court opined that Ameriquest's lack of "actual notice" regarding the existence of Alton's mortgage supported the imposition of equity and served to distinguish it from the result in *Washington Mut Bank,* stating:

> We note only that the absence of actual notice of a mortgage recorded three days before the closing on the Ameriquest loan clearly distinguishes the equities herein from those in *Washington Mut Bank,* in which the refinancing mortgagee neglected to discover the intervening recorded mortgages. In this regard, the result in *Washington Mut Bank* is more properly reached on a consideration of the equities, and particularly the issue of notice, rather than on the basis of a rule that equitable subrogation is inapplicable. [*Ameriquest, supra* at 682.]

The Court concluded that the ruling in *Washington Mut Bank* should be rejected because it "establishes an inflexible rule precluding the application of equitable subrogation in mortgage refinancing" that is "contrary to the principles of equity the doctrine is intended to promote." *Ameriquest, supra* at 683. As such, *Ameriquest* urges the rejection of the purported

establishment of a bright-line rule by *Washington Mut Bank* regarding the applicability of equitable subrogation.

The difficulty with this argument is that *Washington Mut Bank* did not establish an intractable rule regarding equitable subrogation, but rather encompassed both the recognition of the controlling statutory mandate contained in MCL 565.25(4) and the acknowledged constraints on the use of equitable powers by courts. "Although courts undoubtedly possess equitable power, such power has traditionally been reserved for 'unusual circumstances' such as fraud or mutual mistake. A court's equitable power is not an unrestricted license for the court to engage in wholesale policymaking . . . ." *Devillers v Auto Club Ins Ass'n*, 473 Mich 562, 590; 702 NW2d 539 (2005). Because MCL 565.25(4) plainly provides for priority designation based on date of recordation, and Ameriquest has not alleged fraud, mutual mistake, or any other "unusual circumstance" in reference to Alton, there is no basis for this Court to invoke its equitable powers.

Affirmed.

Fitzgerald, P.J., Meter, Fort Hood, and Schuette, JJ., concurred with Talbot, J.

/s/ Michael J. Talbot
/s/ E. Thomas Fitzgerald
/s/ Patrick M. Meter
/s/ Karen M. Fort Hood
/s/ Bill Schuette