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. 2004-058731-CH
ARKAN D. ALTON, Plaintiff-Appellant, v AMERIQUEST MORTGAGE COMPANY, Defendant-Appellee.	No. 264214 Oakland Circuit Court LC No. 2004-058944-CH Official Reported Version

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

BORRELLO, J. (*dissenting*).

I respectfully dissent from the majority opinion and would adopt verbatim this Court's opinion in *Ameriquest Mortgage Co v Alton*, 271 Mich App 660; 726 NW2d 424 (2006), because this Court in *Ameriquest* correctly concluded that, contrary to the holding in *Washington Mut Bank, FA v ShoreBank Corp*, 267 Mich App 111; 703 NW2d 486 (2005), Michigan case law and the Restatement of Property (Mortgages) 3d, § 7.6, p 508, support the application of equitable subrogation to permit a new mortgagee to take the priority position of a former mortgagee when proceeds from the new mortgage are used to pay off and retire a former mortgage.

The holding in *Washington Mut Bank* is premised on the assertion that the decisions in *Walker v Bates*, 244 Mich 582; 222 NW 209 (1928), and *Lentz v Stoflet*, 280 Mich 446; 273 NW 763 (1937), cannot be reconciled. I disagree.

In *Walker*, *supra*, the defendants purchased a home, mortgaged the property with Commonwealth Federal Bank, and used the proceeds of the loan to pay off and retire a previous mortgage. Thus, the *Walker* Court found that Commonwealth Federal Bank was entitled to be

subrogated to the position of the prior mortgagee because it was clear that Commonwealth Federal Bank paid the prior mortgage at the direction of defendants, thereby acting to fulfill a duty to them.

In *Lentz*, the plaintiffs loaned money to defendants in return for a mortgage on certain property which the defendants then used to pay off an existing mortgage. When defendants defaulted on the loan, the Court in *Lentz* determined that plaintiffs were not entitled to be subrogated to the position of the prior mortgage because they had no interests to protect when they advanced the funds.

The principle that emerges from a reading of these two cases is that equitable subrogation is not available to a payor who acts strictly as a volunteer, with no interest to protect or duty to fulfill; but if the payor acts to protect an interest or fulfill a duty, including to pay loan proceeds as directed, the payor is entitled to subrogation. Thus, because I would hold that this Court in *Washington Mut Bank* created a far too restrictive reading of Michigan law on the basis of the erroneous conclusion that *Walker* and *Lentz* are irreconcilable, I would adopt the reasoning of this Court in *Ameriquest*, *supra*.

/s/ Stephen L. Borrello