STATE OF MICHIGAN

COURT OF APPEALS

FIRST NATIONAL BANK OF ST. IGNACE,

Plaintiff-Counterdefendant-Appellee,

v

DONALD P. FRANKOVICH and DIANE F. FRANKOVICH,

Defendants-Counterplaintiffs-Appellants,

and

FRED A. JACKSON and MARGARET M. JACKSON,

Defendants.

UNPUBLISHED
December 20, 1996

No. 184238
LC No. 91-3216-CH

FIRST NATIONAL BANK OF ST. IGNACE,

Plaintiff-Counterdefendant-Appellee,

v

DONALD P. FRANKOVICH and DIANE F. FRANKOVICH,

Defendants-Counterplaintiffs,

and

FRED A. JACKSON and MARGARET M. JACKSON,

Defendants-Appellants.

No. 184240
LC No. 91-31216-CH

Before: Gribbs, P.J., and MacKenzie and Griffin, JJ.

PER CURIAM.

In these consolidated cases, defendants Frankovich and Jackson appeal as of right from a judgment for foreclosure on the Frankovichs' mortgage debt and from an order for sale of the mortgaged property, which had been redeemed by the Jacksons after a prior foreclosure sale. We affirm and remand for further proceedings.

The facts in this case are not significantly in dispute. The Frankovichs borrowed money from plaintiff First National Bank of St. Ignace on three separate occasions: first in 1978, in 1981 and again in 1984. The loans were secured by mortgage liens on two pieces of property owned by the Frankovichs -- a rental home and a commercial parcel referred to as "the barbershop property." In 1990, all three loans were delinquent and the bank initiated foreclosure by advertisement on the 1978 loan, which was guaranteed by the Small Business Administration [SBA]. A few days after initial publication of the foreclosure, the bank and the SBA entered into a subordination agreement in which the 1978 loan was subordinated to the 1981 and 1984 loans. The subordination agreement was recorded within a week of its signing.

The parties agree that the foreclosure sale extinguished the 1981 loan. At the time of the sale, the bank erroneously applied the proceeds of the sale to the 1984 loan rather than to the 1978 loan. Just prior to the expiration of the redemption period and six months after the subordination agreement had been recorded, the Frankovichs assigned their right to redeem the property to the Jacksons, who redeemed the barbershop property as an investment. After approximately one year, the Jacksons reconveyed the property to the Frankovichs via land contract.

The bank originally brought suit seeking a deficiency judgment on the 1978 loan; however, following a counterclaim by the Frankovichs that the bank had illegally failed to apply the proceeds from foreclosure to the loan foreclosed upon, the bank corrected its books to reflect application of the proceeds to the 1978 loan, and filed an amended complaint seeking foreclosure of the 1984 loan and to quiet title to the barbershop property now held by the Jacksons. Both sets of defendants moved for summary disposition, claiming that the bank's original application of the proceeds to the 1984 loan extinguished that loan and the 1978 loan by operation of law. The trial court denied the motions.

Following a bench trial, the court concluded that the bank's initial erroneous application of the loan proceeds to the 1984 loan did not extinguish that loan and that no valid discharge occurred in the absence of any intent on the bank's part to discharge the mortgage. The Frankovichs make the same argument on appeal, contending that the trial court erred in failing to grant their motion for summary disposition because the bank's application of the proceeds to the 1981 and 1984 loans satisfied those loans, and that the subordinated 1978 loan was extinguished by operation of law. However, as the Frankovichs themselves point out, the bank was legally required to apply the proceeds of the sale to the

1978 loan. MCL 600.3252; MSA 27A.3252. That loan was extinguished by the sale, and because it was subordinated to the 1981 and 1984 loans, those loans remained outstanding liens against the property. Consequently, the trial court did not err when it denied defendants' motion for summary disposition.

The Frankovichs next argue that the rental home property should not have been sold at the foreclosure sale because the proceeds from the barbershop property sale were sufficient to satisfy the 1978 loan. This argument is without merit; the total amount necessary to redeem the mortgage was approximately $1,400 in excess of the amount bid by the bank for the barbershop property. The Frankovichs also contend that even if the bank was entitled to sell both properties, it was not entitled to keep any proceeds in excess of the amount necessary to satisfy the 1978 loan and that any surplus should have been paid to them. This argument also fails. MCL 600.3252; MSA 27A.3252 directs the seller to pay the surplus funds to claimants who have subsequent mortgages or liens on the property. Defendants' reliance on *Senters v Ottawa Savings Bank*, 443 Mich 45; (1993), is misplaced because that case is factually distinguishable. The bank in this case is not seeking an equitable lien or deficiency judgment, but is bringing a separate suit to foreclose a separate mortgage. For similar reasons, *Pulleyblank v Cape*, 179 Mich App 690; 446 NW2d 345 (1989), is inapposite; in that case, the mortgagee bid more than the total amount of debt due, leaving no debt to support a subsequent foreclosure. *Id*. at 696.

The Jacksons' first allegation of error is that the court wrongly found that the subordination agreement had been recorded in a timely manner. This issue has not been preserved for review; the trial court cannot be faulted for assuming that the Jacksons concurred as to the timeliness of the recording where their attorney failed to contest the issue in even the slightest regard. Moreover, a review of the record reveals that the recording was both timely and valid.

Although the Jacksons claim they are entitled to recision of the redemption under a host of legal theories, including estoppel, actual fraud, constructive fraud, breach of duty to disclose, and unconscionability, all those theories hinge on two key allegations: first, that the bank falsely represented the mortgage as a first mortgage; and second, that the bank had an affirmative duty to inform the Jacksons that the property was encumbered by another mortgage due to its superior knowledge and expertise, which the Jacksons were entitled to rely on. Each of these assertions will be addressed in turn.

In *Flax v Mutual Building & Loan Ass'n of Bay Co*, 198 Mich 676, 689; 165 NW 835 (1917), our Supreme Court held that the fact that a foreclosure advertisement failed to allege the existence of prior mortgages did not provide grounds for setting aside the sale. The advertisement at issue in this case was not misleading because it contained all the information it was required to contain pursuant to MCL 600.3212; MSA 27A.3212. The Jacksons also contend that they were misled into believing that they would receive clear title because the bank bid full price for the property. However, there is no evidence that the bank's bid was made for the purpose of misleading potential purchasers, and no expert testimony was introduced to establish the fair market value of the property or that the

bank knew of the Jacksons' interest in purchasing the property at the time of the sale. Consequently, it is difficult to see how improper motives can be imputed to the bank on those facts.

Fred and Margaret Jackson both testified at trial that there was no communication between themselves and the bank. Thus, there could have been no affirmative misrepresentation of any material facts made by an employee of the bank to the Jacksons. The Jacksons did not consult with an attorney, conduct a title search, or ask the Frankovichs whether there were additional encumbrances on the property. In *Schweiss v Woodruff*, 73 Mich 473, 477; 41 NW 511 (1889), our Supreme Court held:

> It is the duty of a purchaser of real estate to investigate the title of his vendor, and to take notice of any adverse rights or equities of third persons which he has the means of discovering, and as to which he is put on inquiry. If he makes all the inquiry which due diligence requires, and still fails to discover the outstanding right, he is excused, but, if he fails to use due diligence, he is chargeable, as a matter of law, with notice of the facts which the inquiry would have disclosed.

Consequently, because the Jacksons failed to exercise due diligence, they are chargeable with having had notice of whatever facts the inquiry would have disclosed.

The trial court also correctly determined that the bank owed no affirmative duty to inform the Jacksons as to the state of the title. The problem of notice is precisely the problem the recording statutes were designed to resolve. *American Federal Savings & Loan Ass'n v Orenstein*, 81 Mich App 249, 257; 265 NW2d 111 (1978) (Brown, J., concurring and dissenting in part).

However, the parties agree by stipulation that the subject property was later sold (after entry of the March 8, 1995, circuit court judgment and order) at auction for $43,754.98. Defendants alleged at oral argument, and plaintiff did not dispute, that the total amount received for the property, at its redemption and subsequent sale, amounted to significantly more than the mortgage amount. In the interest of justice, we remand this matter to the trial court for determination whether there is merit to defendants' claim of unjust enrichment.

Affirmed and remanded for further proceedings. We do not retain jurisdiction.

/s/ Roman S. Gribbs
/s/ Barbara B. MacKenzie
/s/ Mark J. Cavanagh