STATE OF MICHIGAN

COURT OF APPEALS

EASTERN SAVINGS BANK,

Plaintiff-Appellant,

v

MONROE BANK & TRUST and NATIONSCREDIT FINANCIAL SERVICES CORPORATION,

Defendants-Appellees.

UNPUBLISHED
November 26, 2002

No. 231886
Oakland Circuit Court
LC No. 00-021066-CH

Before: Fitzgerald, P.J., and Holbrook, Jr., and Griffin, JJ.

PER CURIAM.

Plaintiff Eastern Savings Bank (Eastern) appeals as of right from an order of the circuit court granting defendant NationsCredit Financial Services Corporation's (NationsCredit) motion for summary disposition. Eastern also appeals the circuit court's grant of summary disposition in favor of Monroe Bank & Trust (Monroe). We affirm in part, reverse in part, and remand for further proceedings. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

This appeal involves multiple mortgages given on property at one time owned by Brian and Dina Faucher in Bloomfield Hills (hereinafter the "Bloomfield property"). In September 1994, the Fauchers executed a mortgage on the Bloomfield property in favor of defendant Monroe Bank & Trust (Monroe). The Monroe mortgage was recorded on January 5, 1995. In March 1996, the Fauchers executed a second mortgage in favor of NBD Mortgage Company (NBD). The NBD mortgage was recorded on April 10, 1996. A third mortgage was executed in favor of NationsCredit on September 3, 1998. The NationsCredit mortgage was recorded on September 22, 1998. Eastern maintains that when the NationsCredit mortgage was executed, the Bloomfield property was encumbered by the Monroe mortgage in the amount of $100,000, and the NBD mortgage in the amount of $530,000. Finally, the Fauchers executed a fourth mortgage in favor of Eastern on September 26, 1998. The Eastern mortgage was recorded on January 8, 1999. Eastern maintains that prior to executing this fourth mortgage, it received via facsimile from Able Mortgage Company the following letter written on Monroe's letterhead:

To whom it may concern:

> This letter shall serve to confirm that Monroe Bank & Trust does not have a title interest in the above captioned property owned by Brian & Dian [sic] Faucher.
>
> Should you require any additional information, please feel free to call . . . .

The letter is dated August 19, 1998, and is signed by Joyce Daniels, identified as Assistant Vice President in Monroe's Mortgage Department.[1]

When the Fauchers defaulted on the Eastern and NationsCredit mortgages, both Eastern and NationsCredit foreclosed their mortgages by advertisement. MCL 600.3201 *et seq.* Eastern recorded its Sheriff's Deed on September 14, 1999, and NationsCredit recorded its Sheriff's Deed in December 1999. On January 13, 2000, NationsCredit recorded a Notice of Presumptive Abandonment and an Affidavit of No Response of Presumptive Abandonment, thereby reducing the redemption period to thirty days. MCL 600.3241a. NationsCredit purchased the Bloomfield property at the foreclosure sale. When the Bloomfield property was not redeemed, NationsCredit quitclaimed its interest to Mortgage Acceptance Corporation. The quitclaim deed was recorded on February 14, 2000.

Eastern filed its complaint on February 18, 2000. Count I, entitled "Promissory Estoppel," was directed at Monroe, while count II, entitled "Equitable Subrogation," was directed at NationsCredit. In Count III, "Equitable Relief," Eastern sought a judicial injunction extending the redemption period applicable to the NationsCredit foreclosure.

NationsCredit moved for summary disposition under MCR 2.116(C)(8), arguing that because it had no mortgage or other interest in the Bloomfield property when Eastern's complaint was filed, Eastern could not maintain a cause of action for subrogation against it. Eastern responded that its action was not to quiet title, but to establish the relative priorities of the Eastern Mortgage and the NationsCredit mortgage, and thereby establish to whom the proceeds of the foreclosure sale belong. Eastern maintained that the court should deny NationsCredit's motion and grant summary disposition in favor of Eastern under MCR 2.116(I).

Monroe moved for summary disposition under MCR 2.116(C)(8) and (C)(10), arguing that Eastern could not maintain its claim of promissory estoppel. Absent mistake, fraud, or accident, Monroe maintained that the statutory foreclosure scheme governs. Further, Monroe maintained that the Daniels letter was given to Brain Faucher, at his request, several days before the Fauchers applied for the Eastern mortgage. Monroe maintained that the letter addresses only the issue of whether Monroe held title in the Bloomfield property, and that it is silent on the issue of any mortgage held by Monroe. Further, Monroe maintained that it was the title agent's decision to delete the Monroe mortgage from the title insurance policy, and the title insurance carrier has agreed to honor Eastern's claim.

In response, Eastern argued that while count I of its complaint was erroneously entitled "promissory estoppel," it is clear that the claim is based on the doctrine of equitable estoppel. Further, the claim is to quiet title, not to enforce a promise. Eastern asserted that Monroe intentionally or negligently induced Eastern to erroneously believe it had no interest in the

[1] Throughout the remainder of this opinion, this letter will be referred to as the "Daniels letter."

Bloomfield property. By addressing the letter to "whom it may concern," Eastern maintained that Monroe knew and anticipated that it might be relied upon by others. As for Monroe's reference to Eastern's title insurance, Eastern claimed that this argument is unsupported and improper.

The court granted both motions for summary disposition, reasoning as follows:

> With regard to Nations Credit, the evidence indicates that Nations Credit properly accelerated the redemption period and obtained title and subsequently sold the property prior to the commencement of this action.
>
> Where a mortgagee elects foreclosure by advertisement, the statutes that govern are MCL 600.3201, et. seq. Plaintiff having failed to establish fraud, accident, or mistake, there is no room for equitable consideration. [*Senters v Ottawa Savings Bank*, 443 Mich 45; 503 NW2d 639 (1993).] Nations Credit motion is granted.
>
> With regard to Monroe Bank and Trust, plaintiff contends its claim is one of equitable estoppel and not promissory estoppel. Equitable estoppel, however, is a doctrine, not a cause of action available to plaintiff, ... As such, plaintiff has failed to state a claim upon which relief can be granted, summary disposition is appropriate pursuant to MCR 2.116(c)(8) [sic].
>
> As for any promissory estoppel claim, the evidence indicates the promise was not made to Eastern. Since there was no clear promise made to the parties asserting the claim, there is no basis for the promissory estoppel claim, ... As such, summary disposition is appropriate to this party pursuant to MCR 2.116(c)(10) as well.

Eastern first argues that the trial court erred in granting summary disposition to NationsCredit. Specifically, Eastern asserts that the court erred in concluding that NationsCredit's foreclosure of its mortgage under the foreclosure by advertisement statute barred Eastern's claim for equitable relief. Further, Eastern asserts that it has stated a valid claim for equitable subrogation. We agree.

This Court reviews decisions on motions for summary disposition de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). The order granting summary disposition to NationsCredit does not identify the sub rule under which it was granted, but because the trial court was asked to examine evidence outside the pleadings when rendering its decision, the issue will be reviewed under the standard of review applicable to MCR 2.116(C)(10). *Kubisz v Cadillac Gage Textron, Inc*, 236 Mich App 629, 633, n 4; 601 NW2d 160 (1999).

> A motion pursuant to MCR 2.116(C)(10) tests the factual basis underlying a plaintiff's claim. MCR 2.116(C)(10) permits summary disposition when, except for the amount of damages, there is no genuine issue concerning any material fact and the moving party is entitled to damages as a matter of law. A court reviewing such a motion must consider the pleadings, affidavits, depositions, admissions,

> and any other evidence in favor of the opposing party and grant the benefit of any reasonable doubt to the opposing party. [*Stehlik v Johnson (On Rehearing)*, 206 Mich App 83, 85; 520 NW2d 633 (1994).]

It appears from the motion hearing that the court believed that in the context of a foreclosure by advertisement, any consideration of equitable concerns is foreclosed by the statutory scheme. We disagree. In support of its position, the court cited our Supreme Court's holding in *Senters, supra*. The *Senters* Court observed that "[w]here . . . a statute is applicable to the circumstances and dictates the requirements for relief by one party, equity will not interfere." *Id.* at 56. However, the issue in *Senters* centered on the process of redemption of a foreclosed property. The *Senters* Court concluded that because the statutory scheme pertaining to foreclosure by advertisement clearly set forth the requirements a mortgagor had to satisfy in order to redeem property after a mortgage foreclosure sale, there was "no room for equitable considerations absent fraud, accident, or mistake." *Id.* at 55. Eastern is not asking that the mechanisms of the foreclosure and redemption scheme be disregarded. Indeed, Eastern's claim of equitable subrogation does not even reach the foreclosure process. Rather, Eastern is claiming that once the statutory process was complete, the Bloomfield property was still encumbered by a mortgage that Eastern claims by equitable subrogation. Accordingly, *Senters* is inapposite.

We also believe that Eastern has stated a valid claim for equitable subrogation. Subrogation is defined "as '[t]he substitution of one person in the place of another with reference to a lawful claim, demand or right, . . . so that he who is substituted succeeds to the rights of the other in relation to the debt or claim, and its rights, remedies, or securities.'" *Yerkovich v AAA*, 461 Mich 732, 737; 610 NW2d 542 (2000), quoting Black's Law Dictionary (4th ed), p 1595. See also *Allstate Ins Co v Snarski*, 174 Mich App 148, 154; 435 NW2d 408 (1988). In the context of a creditor, subrogation means the substitution of one person in the place of the creditor, so that he who is substituted succeeds to the rights of the creditor in relation to the debt. *Blankenship v Estate of Bain*, 5 SW3d 647, 650 (Tenn, 1999). Subrogation can arise either "by contract or by an express act of the parties," or "by operation of law or by implication in equity to prevent fraud or injustice." Black's Law Dictionary (7th ed), 1440. The former is commonly called "conventional subrogation," while the latter, imposed as an equitable remedy, is known as "legal subrogation" or "equitable subrogation." *Id.* at 1440-1441.

Because equitable subrogation is a creature of equity, its application depends on a close examination of the circumstances and a balancing of the equities between the parties. In the context of a mortgage, when one person has discharged the mortgage debt of another, the circumstances may be such that "the payor . . . is warranted in receiving, by subrogation, the benefit and priority of the mortgage paid." Restatement Property (Mortgages), § 7.6, comment e, p 519. However, equitable subrogation "will not be enforced where it will work injustice to the rights of those having equal equities." *Board of Co Road Com'rs of Calhoun Co v Southern Surety Co*, 216 Mich 528, 533; 185 NW 755 (1921). Accord *Fraser v Fleming*, 190 Mich 238, 244; 157 NW 269 (1916). The factors that should be considered in balancing the equities include, but are not limited to, the diligence or negligence of the parties, the harm or prejudiced suffered by the parties, and the actual knowledge and the reasonable expectations of the payor.

Principles of subrogation often arise in the context of mortgage refinancing. Restatement Property (Mortgages), § 7.6, comment e, p 519 ("The most common context for this sort of subrogation is the 'refinancing' of a mortgage loan; that is, the payment of a loan with the

proceeds of another."). The Restatement provides a helpful compilation of the relevant principles:

> § 7.6 Subrogation
>
> (a) One who fully performs an obligation of another, secured by a mortgage, becomes by subrogation the owner of the obligation and the mortgage to the extent necessary to prevent unjust enrichment. Even though the performance would otherwise discharge the obligation and the mortgage, they are preserved and the mortgage retains its priority in the hands of the subrogee.
>
> (b) By way of illustration, subrogation is appropriate to prevent unjust enrichment if the person seeking subrogation performs the obligation:
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> (1) in order to protect his or her interest;
>
> (2) under a legal duty to do so;
>
> (3) on account of misrepresentation, mistake, duress, undue influence, deceit, or other similar imposition; or
>
> (4) upon a request from the obligor or the obligor's successor to do so, if the person performing was promised repayment and reasonably expected to receive a security interest in the real estate with the priority of the mortgage being discharged, and if subrogation will not materially prejudice the holders of intervening interests in the real estate. [Restatement Property (Mortgages), § 7.6, p 508.]

The Restatement also provides commentary pertinent to the case at bar:

> Perhaps the case occurring most frequently is that in which the payor is actually given a mortgage on the real estate, but in the absence of subrogation it would be subordinate to some intervening interest, such as a junior lien. Here subrogation is entirely appropriate, and by virtue of it the payor has the priority of the original mortgage that was discharged. This priority is often of critical importance, since it will place the payor's security in a position superior to intervening liens and other interests in the real estate. The holders of such intervening interests can hardly complain of this result, for it does not harm them; their position is not materially prejudiced, but is simply unchanged.

Eastern maintains that the vast majority of the proceeds of its mortgage loan were intended to, and were indeed used to, satisfy the NBD mortgage. Under the circumstances, we believe that to the extent that the proceeds were used to discharge the NBD mortgage, Eastern has stated a claim for equitable subrogation sufficient to withstand a motion for summary disposition. This situation requires a balancing of the equities to determine whether equitable subrogation is a proper remedy.

Contrary to the position taken by NationsCredit, Eastern was not required to redeem the property in order to protect its interest in the Bloomfield property. A purchaser at the foreclosure of a junior mortgage takes the property subject to a superior mortgage. MCL 600.3236; *Board of Trustees of the General Retirement Sys v Ren–Cen Indoor Tennis & Racquet Club*, 145 Mich App 318, 322; 377 NW2d 432 (1985). Assuming Eastern can demonstrate that it is entitled to equitable subrogation, then the purchaser of the Bloomfield property on the foreclosure of the junior mortgage would have taken the property subject to Eastern's superior mortgage.

Eastern also argues that the trial court erred in granting summary disposition to Monroe. We disagree. The court ruled that summary disposition was proper under both MCR 2.116(C)(8) and (C)(10). "MCR 2.116(C)(8) permits summary disposition when the opposing party has failed to state a claim upon which relief can be granted. A motion under this subsection determines whether the opposing party's pleadings allege a prima facie case. The court must accept as true all well-pleaded facts." *Stehlik, supra* at 85.

Eastern's position on this matter continues to evolve. In response to Monroe's motion for summary disposition, Eastern argued that despite how the claim was designated, it was actually a claim for equitable estoppel. Then at the November 20, 2000, motion hearing, Eastern backed off of this potion, and argued that whether its claim was for promissory estoppel, equitable estoppel, or perhaps even negligence, they had stated a valid claim for relief. On appeal, Eastern argues that this claim was not mislabeled and that it does state a valid claim for promissory estoppel. In the alternative, Eastern argues that it has stated a valid claim to quiet title and has properly asserted equitable estoppel as an anticipatory defense.

We believe that this claim is not justiciable because there is no controversy for the courts to address, given that the evidence of record establishes that the Monroe mortgage was paid off. Rick Kinsey, Assistant Vice President of Monroe Bank & Trust, averred that the Monroe mortgage "was paid off by Nationscredit [sic] as part of their foreclosure against the property." If the mortgage has been discharged, then Eastern's prayer for relief—that the trial court declare that Monroe's interest is junior to its own—is moot, i.e., Monroe no longer has an interest in the Bloomfield property that need be prioritized. If Eastern is presuming that Monroe's position will be altered if it succeeds on its claim of equitable subrogation, then the Monroe claim is not ripe.

In any event, we find no merit in Eastern's argument on appeal. In support of its assertion that it has stated a valid claim of promissory estoppel, Eastern cites to *First Security Savings Bank v Aitken*, 226 Mich App 291; 573 NW2d 307 (1997), overruled in part on other grounds, *Smith v Global Life Ins Co*, 460 Mich 446; 597 NW2d 28 (1999). The defendants in *Aitken* had argued that as third-party beneficiaries to an agreement between First Security Savings Bank and a joint venture promoting a condominium development, they were entitled to damages resulting from an alleged breach of that agreement. *Aitken, supra* at 294. The *Aitken* Court concluded that the defendants did not have standing to raise a breach of contract claim. *Id.* at 309. Alternatively, the defendants argued, in part, that they were entitled to damages because they had stated a valid claim of promissory estoppel. *Id.* at 310.

Eastern has not claimed that it was the intended third party beneficiary of a promise between Monroe and some other entity, nor has Eastern claimed that it is due damages on the basis that it detrimentally relied on the Daniels letter. Thus, the analysis of *Aitken* is inapposite. Further, we are convinced after a review of the record that Eastern cannot establish that it relied

on a clear and definite promise by Monroe, nor can it establish that any reliance was reasonable. *Ypsilanti Twp v General Motors Corp*, 201 Mich App 128, 133-134; 506 NW2d 556 (1993).

"'A promise is a manifestation of intention to act or refrain from acting in a specified way, so made as to justify a promisee in understanding that a commitment has been made.'" *State Bank of Stanish v Curry*, 442 Mich 76, 85; 500 NW2d 104 (1993), quoting 1 Restatement Contracts, 2d, § 2, p 8. The language of the Daniels letter does not clearly and definitively indicate that Monroe is promising to take or refrain from taking any action. See *Ypsilanti, supra* at 134. Assuming that it conveys an intent not to pursue the interest identified, Monroe did not identify that interest as a mortgage in the Bloomfield property. Rather, Monroe indicated that it "does not have a title interest" in the Bloomfield property. There is no contention that Monroe has a possessory interest in the Bloomfield property. If the phrase "title interest" can be defined to include any recorded interest in the Bloomfield property, then it could arguably be interpreted to be inferring that the Monroe mortgage had been satisfied. At this point, however, we are far removed from a clear and definite manifestation of intent.

We also conclude that the record does not establish that any reliance by Eastern was reasonable. As we have just discussed, the Monroe letter does not rise to the level of a clear and definite promise that Monroe does not have a mortgage interest in the Bloomfield property. This ambiguity itself precludes a claim of reasonable reliance. *Aitken, supra* at 318. Additionally, Kinsey averred that the Daniels letter "was not issued to or requested by Able Mortgage Co or by Eastern Savings Bank (emphasis in original). Eastern has failed to present any documentary evidence proving that either Able or itself requested a payoff letter from Monroe. *Global Life Ins Co, supra* at 455. Thus, Monroe cannot establish that it had any reasonable basis on which to judge the authenticity and validity of the Daniels letter, or the purpose for which it was composed, prior to issuing the mortgage loan.

As for Eastern's alternate argument, because Eastern cannot establish that it reasonably or justifiably relied on any representations in the Daniels letter, Eastern cannot establish that its mortgage interest is superior to Monroe's. MCR 3.111; MCL 600.2932. Accordingly, the court properly granted summary disposition in favor of Monroe.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ E. Thomas Fitzgerald
/s/ Donald E. Holbrook, Jr.
/s/ Richard Allen Griffin