STATE OF MICHIGAN

COURT OF APPEALS

CHERYLE M. MOUNTS,

Plaintiff/Counterdefendant-Appellee,

v

COUNTRYWIDE HOME LOANS, INC.,

Defendant/Counterplaintiff/Cross-Plaintiff-Appellant,

and

CRAIG S. IMHOFF and NATIONAL REAL ESTATE INFORMATION SERVICES OF MICHIGAN, INC.,

Defendants/Cross-Defendants,

and

FIDELITY NATIONAL TITLE INSURANCE COMPANY OF NEW YORK,

Defendant.

UNPUBLISHED
November 18, 2004

Nos. 248899; 252638
Oakland Circuit Court
LC No. 2002-043512-CH

Before: Borrello, P.J., and Murphy and Neff, JJ.

PER CURIAM.

In Docket No. 248899, defendant and counterplaintiff Countrywide Home Loans, Inc., (hereafter "Countrywide") appeals by leave granted the trial court's order denying its motion to set aside a default judgment that was entered in favor of plaintiff with respect to plaintiff's claims for slander of title and to quiet title against defendant Craig S. Imhoff in connection with residential property in Madison Heights. In Docket No. 252638, Countrywide appeals as of right the trial court's later order extinguishing its mortgage interest in the property, dismissing its counterclaims, and granting summary disposition in favor of plaintiff with respect to her action to quiet title. We affirm in part and reverse in part.

On October 30, 1998, plaintiff, as the sole owner of certain residential property, quitclaimed the property to herself, as a single woman, and Imhoff, as a single man. Imhoff was plaintiff's live-in boyfriend. No consideration for the transfer was recited in the deed. Also on October 30, 1998, plaintiff and Imhoff, as borrowers and mortgagors, executed a mortgage to Worldwide Financial Services, Inc., for $64,400.

On June 2, 1999, with the assistance of a mortgage broker, Sterling Mortgage & Investment Company (hereafter "Sterling"), Imhoff applied for an $80,000 mortgage from America's Wholesale Lender, an apparently related or predecessor corporation of Countrywide.[1] The stated purpose of Imhoff's loan application was to refinance an existing loan. Imhoff's loan application identified plaintiff as a joint titleholder, but not as a loan applicant. Plaintiff nonetheless had an active role in the loan application process, meeting with a Sterling loan officer and an appraiser regarding the loan application, and she expected her name to be on the mortgage.

The loan application was eventually approved, with Countrywide providing instructions to National Real Estate Information Services of Michigan, Inc., (hereafter "National"), regarding how to proceed with the closing. Also, National, as an agent for Fidelity National Title Insurance Company (hereafter "Fidelity"), issued a loan title insurance commitment before the closing scheduled for July 9, 1999. It identified the titleholders as plaintiff and Imhoff, a single woman and a single man, but conditioned the commitment on a mortgage being executed by Imhoff and plaintiff as husband and wife. The proposed insured was Sterling, its successors and/or its assigns.

Another corporate entity, Mortgage Closings, Inc., handled the actual closing on July 9, 1999, as a subcontractor of National. Imhoff executed the $80,000 mortgage, as an unmarried man, and the associated promissory note on the date of the closing. Plaintiff was not named as a borrower or mortgagor in either document. Further, she was not asked to execute either document. Most of the loan proceeds were used to pay off the existing mortgage for the property, but Imhoff also received cash proceeds.

After the closing, Fidelity issued a loan policy of title insurance to Countrywide. The policy stated that it was subject to the interest of plaintiff, who did not join in the execution of the mortgage.

Imhoff subsequently ceased residing with plaintiff at the property and stopped making mortgage payments to Countrywide. In August 2002, plaintiff received a mortgage foreclosure notice. In September 2002, plaintiff filed a notice of lis pendens and commenced the instant action against Countrywide and Imhoff to determine their interests in the property. Plaintiff also

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[1] For purposes of our opinion, we will hereafter refer to America's Wholesale Lender as Countrywide.

sought monetary damages from National, Fidelity, and Imhoff, alleging slander of title against Imhoff under MCL 565.108.[2]

After the complaint was filed, the trial court issued a preliminary injunction prohibiting Countrywide from holding a foreclosure sale with respect to the property. Imhoff failed to plead or respond to plaintiff's complaint and, in December 2002, the trial court granted plaintiff a default judgment against Imhoff in the amount of $80,312. Also, the court ordered that Imhoff's name was to be removed from the chain of title for the property and that any interest he had in the property, legal or equitable, was extinguished.

In March 2003, the trial court denied Countrywide's motion to set aside the default judgment against Imhoff, based on its determination that Countrywide lacked standing to have the default judgment set aside, but it granted Countrywide's motion to file a countercomplaint and cross-complaint to allege equitable claims against plaintiff and Imhoff for the amount due under the promissory note. In May 2003, the trial court denied Countrywide's motion for reconsideration.

In June 2003, the trial court granted a default judgment in favor of Countrywide with respect to its cross-claim for monetary damages against Imhoff. The trial court subsequently granted summary disposition in favor of plaintiff with respect to her action to quiet title and dismissed Countrywide's equitable counterclaims, extinguishing Countrywide's mortgage interest in the property. This appeal followed.

On appeal, Countrywide argues that the trial court should have set aside or modified the default judgment against Imhoff pursuant to its authority to revise nonfinal orders and judgments under MCR 2.604(A). Because Countrywide first presented its argument concerning MCR 2.604(A) in its motion for reconsideration of the trial court's order denying its motion to set aside the default judgment, we consider Countrywide's appeal under the abuse of discretion standard applicable to a trial court's denial of a motion for reconsideration. *Churchman v Rickerson*, 240 Mich App 223, 233; 611 NW2d 333 (2000). MCR 2.119(F)(3) provides:

> Generally, and without restricting the discretion of the court, a motion for rehearing or reconsideration that merely presents the same issues ruled on by the court, either expressly or by reasonable implication, will not be granted. The moving party must demonstrate a palpable error by which the court and the parties have been misled and show that a different disposition of the motion must result from correction of the error.

Nonetheless, a trial court has considerable discretion with regard to the motion, and may even give a party a "second chance" on a previously denied motion. *Kokx v Bylenga*, 241 Mich App 655, 659; 617 NW2d 368 (2000). To the extent the court's discretion depends on a question of law, an appellate court reviews the question of law de novo. See generally *Federated Publications, Inc v Lansing*, 467 Mich 98, 106; 649 NW2d 383 (2002).

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[2] The disposition of claims against National and Fidelity are not at issue in this appeal.

In seeking to have the trial court set aside the default judgment against Imhoff, Countrywide's argument was directed solely at the portion of the default judgment that extinguished Imhoff's legal title to the property that was subject to Countrywide's mortgage.

MCR 2.604 (A) provides in relevant part:

> Except as provided in subrule (B), an order or other form of decision adjudicating fewer than all the claims, or the rights and liabilities of fewer than all the parties, does not terminate the action as to any of the claims or parties, *and the order is subject to revision* before entry of final judgment adjudicating all the claims and the rights and liabilities of all the parties. [Emphasis added.]

In *Whitcraft v Wolfe*, 148 Mich App 40; 384 NW2d 400 (1985), this Court addressed a situation where a sports car company agreed to purchase a vehicle from Wolfe and took possession of the vehicle but ultimately failed to pay Wolfe. In the meantime, Whitcraft purchased the vehicle from the car company. Wolfe sued the car company and obtained a partial default judgment, ordering that possession of the vehicle be returned to Wolfe. Subsequently, Wolfe and Whitcraft became embroiled in litigation over who was entitled to the car. The trial court eventually ruled at summary disposition that Whitcraft was entitled to possession of the vehicle and that Wolfe receive a $62,000 judgment against the car company. *Id.* at 44-48. This Court found, in part, that the sports car company failed to execute the necessary title documentation in transferring the car to Whitcraft, and it remanded the case to the trial court for further proceedings. *Id.* at 51. The *Whitcraft* panel provided the following direction on remand:

> Because of the procedural posture of this case and the complicated nature of the issues presented, we find it appropriate to provide guidance in regard to several issues that may arise on remand. Initially, we note that the claims of both parties [Whitcraft and Wolfe] depend to an extent on common questions of fact and law and that both parties believe that they are entitled to possession of the car. Resolution of certain issues will affect both parties' claims and any orders entered in regard to one claim must take into account the status of the other. Thus while there is no appeal from the default judgment entered in regard to Wolfe's claim against [the sports car company], that judgment is subject to modification if necessary. See GCR 1963, 518.2; MCR 2.604(B).[3]
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> We also note that, as part of the initial default judgment in Wolfe's original case against [the car company], the court ordered that the vehicle "be returned" to Wolfe and that it "continue in his possession until further order of the court." While the court's final judgment in this case impliedly set that order aside, we wish to make it clear that the order is set aside. [*Whitcraft, supra* at 51.]

[3] The language in MCR 2.604(A) is comparable to the language that was, at the time *Whitcraft* was decided, found in MCR 2.604(B). See *Michigan Rules of Court – 1985.*

MCR 2.604(A) empowers a court to revise a previous order to reflect a more correct adjudication of the rights and liabilities of the litigants. *Meagher v Wayne State Univ*, 222 Mich App 700, 718-719; 565 NW2d 401 (1997).

Under the circumstances presented here, the default judgment's extinguishment of any legal or equitable interest that Imhoff had in the property affected Countrywide's mortgage interest that necessarily arose through Imhoff's interest, which was created by the quitclaim deed executed by plaintiff. See *Townsend v Chase Manhattan Mortgage Corp*, 254 Mich App 133, 137; 657 NW2d 741 (2002)(mortgage effectively terminated by death of joint owner who signed mortgage because death extinguished her interest in property and other joint owner, who had rights of survivorship, had not executed mortgage). Countrywide, in order to establish a valid mortgage and to foreclose on the mortgage, needed to show that its interest flowed from Imhoff's interest in the property as he was the only person to execute the mortgage.

While "a traditional rule of default provides that the default of one party is not an admission of liability on the part of a nondefaulting party[,]" *Rogers v J B Hunt Transport, Inc*, 466 Mich 645, 653; 649 NW2d 23 (2002), if Countrywide was permitted to pursue its case and established a valid mortgage interest by showing that the quitclaim deed constituted a valid property transfer, without any modification of the default judgment, there would exist two contradictory court orders regarding the property. Arguably, Countrywide could have attempted to proceed with the litigation to enforce its mortgage interest with respect to Imhoff without attempting to set aside or modify the default judgment, but the record indicates that the trial court was not going to revisit the conclusion that Imhoff had no interest as reflected in the default judgment and that the court believed that this doomed Countrywide's pursuit of its mortgage interest.

Countrywide is entitled to litigate the legal validity of the quitclaim deed and the question of whether the deed effectively transferred an ownership interest to Imhoff that would be subject to the mortgage executed by Imhoff. There was a common question of fact in regard to Countrywide's mortgage claim and the quiet title action against Imhoff, i.e., whether the quitclaim deed purporting to give Imhoff an interest was valid, and the trial court failed to take this into account. MCR 2.604(A) allowed the trial court to revisit the issue and modify the default judgment at Countrywide's behest. Moreover, Countrywide has a substantial personal interest at stake and thus has standing. See *Michigan Coalition of State Employee Unions v Civil Service Comm*, 465 Mich 212, 217-218; 634 NW2d 692 (2001). Accordingly, summary disposition was improper on plaintiff's action to quiet title with respect to any mortgage interest Countrywide may hold in the property through Imhoff.

Next, Countrywide challenges the trial court's grant of summary disposition in favor of plaintiff with respect to its counterclaims for equitable mortgage, unjust enrichment, and reformation.

Because the trial court considered matters outside the pleadings when granting summary disposition in favor of plaintiff, we review its decision under MCR 2.116(C)(10). See *Spiek v Dep't of Transportation*, 456 Mich 331, 338; 572 NW2d 201 (1998); *Velmer v Baraga Area Schools*, 430 Mich 385, 389; 424 NW2d 770 (1988). "Grants or denials of summary disposition on equitable actions are reviewed de novo." *Village of Hickory Pointe Homeowners Ass'n v Smyk*, 262 Mich App 512, 515; 686 NW2d 506 (2004). Summary disposition may be granted

under MCR 2.116(C)(10) when the proofs show no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Id.*

As a matter of law, we conclude that the trial court correctly granted summary disposition in favor of plaintiff with regard to Countrywide's equitable mortgage counterclaim, which sought to reach plaintiff's own interest in the property as security for the loan made solely to Imhoff. Because a mortgage constitutes an interest in land within the meaning of the statute of frauds, MCL 566.106, equity cannot be used to avoid the writing required by the statute, absent fraud, accident, or mistake. *Burkhardt v Bailey*, 260 Mich App 636, 659; 680 NW2d 453 (2004).

Here, Countrywide did not allege fraud or accident. Further, while there was evidence of a mistake, it did not provide a factual basis for imposing an equitable mortgage against plaintiff's property interest. Countrywide's reliance on *Schram v Burt*, 111 F2d 557 (CA 6, 1940), is misplaced because there was no evidence in this case that would support an inference that Imhoff acted as plaintiff's agent when signing the promissory note and mortgage. Unlike *Schram*, Imhoff did not sign plaintiff's name on the documents. Rather, at most, the evidence indicated that Countrywide made a mistake by not requiring plaintiff to pledge her interest in the mortgage to secure the loan to Imhoff, notwithstanding Imhoff's disclosure of plaintiff's property interest on his loan application for refinancing and the condition in the commitment for the loan policy of title insurance that plaintiff execute the mortgage.

We reject Countrywide's argument that plaintiff's active role in the loan application process, the understanding reached before closing that plaintiff would sign the mortgage, plaintiff's actual benefit from loan proceeds, and plaintiff's prior experience in applying for mortgage refinancing supports a basis for invoking the doctrine of equitable mortgage under the circumstances of this case. The relevant time for determining whether the parties reached a meeting of the minds with regard to the mortgage was the time of closing. "Mere discussions and negotiation, including unaccepted offers, cannot be a substitute for the formal requirements of a contract." *Kamalnath v Mercy Mem Hosp Corp*, 194 Mich App 543, 549; 487 NW2d 499 (1992)(citation omitted). It is "insufficient to invoke equity to save the mortgagee from its own mistake, particularly where the mortgagee is a sophisticated commercial lender." *Townsend, supra* at 140.

In sum, the trial court properly granted summary disposition in favor of plaintiff with regard to Countrywide's counterclaim because no genuine issue of material fact was shown. As a matter of law, the evidence did not support the imposition of an equitable mortgage against plaintiff's interest in the property.

Having found no factual support for Countrywide's equitable mortgage counterclaim, we also reject Countrywide's claim that the trial court erred in granting plaintiff summary disposition with respect to its counterclaim for reformation of the mortgage. The "scrivener error" doctrine does not apply because there was no evidence of a scrivener acting on behalf of both Countrywide and plaintiff. *Capitol Savings & Loan Ass'n v Przybylowicz*, 83 Mich App 404, 410; 268 NW2d 662 (1978).

Further, Countrywide cites no authority that would permit the trial court to reform the mortgage document to add plaintiff as a party. The general purpose of reformation is to reform an instrument to reflect the parties' actual intent. *Mate v Wolverine Mut Ins Co*, 233 Mich App

14, 24; 592 NW2d 379 (1998). We find no basis for Countrywide's cursory claim that a "mutual mistake" occurred. A mutual mistake must relate to a fact in existence when the contract is executed. *Farm Bureau Mut Ins Co of Michigan v Buckallew,* 262 Mich App 169, 179; 685 NW2d 675 (2004). Here, Countrywide offered no evidence to reasonably support an inference that plaintiff knew that the mortgage document did not accurately express Countrywide's intent at the time of closing. Cf. *Woolner v Layne,* 384 Mich 316; 181 NW2d 907 (1970). Hence, Countrywide's counterclaim for reformation fails as a matter of law.

Finally, we also affirm the trial court's grant of summary disposition in favor of plaintiff with respect to Countrywide's unjust enrichment counterclaim. Although there was evidence that plaintiff benefited from the loan proceeds acquired by Imhoff, benefit alone is not the test for a court of equity to impose a quasi or constructive contract upon which recovery may be had. *Michigan Educational Employees Mut Ins Co v Morris,* 460 Mich 180, 198; 596 NW2d 142 (1999); *Belle Isle Grill Corp v Detroit,* 256 Mich App 463, 478; 666 NW2d 271 (2003). An inequity must result from a party's receipt of a benefit from another party. *Id.* "Because this doctrine vitiates normal contract principles, the courts 'employ the fiction with caution, and will never permit it in cases where contracts, implied in fact, must be established, or substitute one promisor or debtor for another.'" *Kammer Asphalt Paving Co, Inc v East China Twp Schools,* 443 Mich 176, 186; 504 NW2d 635 (1993)(citation omitted).

Here, as indicated earlier, the closing was the proper time to determine the formal requirements of the loan agreement. *Kamalnath, supra* at 549. In light of the evidence that Countrywide's express instructions for the closing only required that Imhoff execute the closing documents, including the promissory note and mortgage, the evidence did not establish a legal or factual basis for invoking the doctrine of unjust enrichment. Plaintiff's receipt of a benefit through Imhoff's loan proceeds did not result in inequity. We reiterate the statement made by this Court in *Townsend, supra* at 140, "We think it insufficient to invoke equity to save the mortgagee from its own mistake, particularly where the mortgagee is a sophisticated commercial lender." Hence, the trial court properly granted plaintiff summary disposition of Countrywide's counterclaim for unjust enrichment.

Affirmed in part and reversed in part and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Stephen L. Borrello
/s/ William B. Murphy
/s/ Janet T. Neff