

STATE OF MICHIGAN
COURT OF APPEALS

RUTH ANN RICE, CHARLES RICE and
GREAT LAKES BUILDERS,

UNPUBLISHED
November 17, 2005

Plaintiffs-Appellees,

v

No. 253843
Genesee Circuit Court
LC No. 01-070306-CK

BRIAN RICE,

Defendant,

and

THELMA RICE,

Defendant-Appellant.

Before: Hoekstra, P.J., and Gage and Wilder, JJ.

PER CURIAM.

Defendant Thelma Rice¹ appeals as of right a foreclosure order entered pursuant to an order granting plaintiffs summary disposition. We affirm.

While defendants Brian Rice (“Brian”) and Thelma Rice were married, Brian acquired by gift from his sister and his mother, plaintiff Ruth Ann (“Ruth Ann”), a quitclaim deed to a piece of unimproved property in Genesee Township. Defendant was not named on the title. While defendants were separated, but still married, Brian conveyed the land to his father, plaintiff Charles Rice (“Charles”), and Ruth Ann, without defendant’s signature. This deed served as collateral for a contractors’ agreement, pursuant to which plaintiff Great Lakes Builders² agreed to build a house on the land in exchange for payments from Brian. If Brian made all the payments in full, the land would then be deeded back to him; otherwise, it would remain the property of Charles and Ruth Ann. Defendant did not sign the contractors’ agreement.

¹ Because defendant Brian Rice did not appear in the lower court and is not a party to this appeal, we shall singularly refer to Thelma Rice as defendant.

² Charles and Ruth Ann own Great Lakes Builders.

After construction of the house was completed, Brian failed to make the required payments, and Great Lakes sought foreclosure. The trial court granted a default against Brian for failure to appear and summary disposition against defendant for failure to state a valid defense. The trial court concluded that the deed of transfer from Brian to Charles and Ruth Ann was a mortgage, which did not require defendant's signature. The trial court also held that defendant retained a right of redemption, but that her dower interest did not prevent foreclosure. Charles and Ruth Ann subsequently purchased the property at a public foreclosure sale.

During the foreclosure proceedings, defendants' divorce was finalized. The trial court awarded defendant one-third of the appraised value of the home, less the value of the unimproved land at the time it was gifted to Brian, or \$37,666.66. Brian appealed the trial court's distribution of the marital estate and award of alimony. This Court concluded that the quitclaim deed conveying the property to Charles and Ruth Ann was ineffective without defendant's signature. See *Brian Rice v Thelma Rice*, unpublished opinion per curiam of the Court of Appeals, issued January 18, 2005 (Docket No. 249072). This Court also determined that the trial court properly included the property in the marital estate, but reduced defendant's lien to one-half of the value of the gifted land without the house at the time of trial, or \$7,500 of \$15,000.

On appeal, defendant argues that plaintiffs could not foreclose against her because she did not sign the deed or contractors' agreement. Defendant claims that the deed and contract were void ab initio without her signature pursuant to the dower statute, MCL 558.1, and the statute of frauds, MCL 566.108. She further argues that plaintiffs' case should be dismissed as a result of this Court's recent opinion in the appeal of defendants' divorce case. *Rice, supra*.

We review de novo a trial court's decision on a motion for summary disposition. *Graves v American Acceptance Mortgage Corp (On Rehearing)*, 469 Mich 608, 613; 677 NW2d 829 (2004). Summary disposition pursuant to MCR 2.116(C)(9) is appropriate if the defendant fails to raise a valid defense to the plaintiff's claims. *Wheeler v Shelby Twp*, 265 Mich App 657, 663; 697 NW2d 180 (2005). Summary disposition is proper if the defenses asserted are so clearly untenable as a matter of law that no factual development could possibly deny the plaintiff's right to recovery. *Id.* When reviewing equitable actions, this Court reviews the equitable decision de novo, and findings of fact in support of the decision are reviewed for clear error. *LaFond v Rumler*, 226 Mich App 447, 450; 574 NW2d 40 (1997). Findings of fact are considered clearly erroneous if this Court is left with "a definite and firm conviction that a mistake has been made." *Id.*

Defendant argues that this Court's opinion in her divorce case requires dismissal of plaintiffs' case. However, the law of the case doctrine is inapplicable because it applies only to subsequent appeals of the same case. *Grievance Administrator v Lopatin*, 462 Mich 235, 259; 612 NW2d 120 (2000). Furthermore, collateral estoppel does not apply because plaintiffs were not parties to the divorce case and could not have obtained review of the judgment in that case. *Monat v State Farm Ins Co*, 469 Mich 679, 682-684; 677 NW2d 843 (2004).

A widow is entitled to "dower, or the use during her natural life, of 1/3 part of all the lands whereof her husband was seized of an estate of inheritance, at any time during the marriage, unless she is lawfully barred thereof." MCL 558.1. When combined with the statute of frauds, MCL 566.108, MCL 558.1 requires a wife's signature for a contract for the sale of

land to be valid. *Slater Management Corp v Nash*, 212 Mich App 30, 32; 536 NW2d 843 (1995).

The trial court concluded that the deed and contract between Brian and plaintiffs constituted a mortgage rather than a transfer of land. An agreement merely involving a deed that is absolute on its face may be deemed a mortgage if equity so requires. The controlling factor is the intention of the parties. *Koenig v Van Reken*, 89 Mich App 102, 106; 279 NW2d 590 (1979). The contractors' agreement explicitly states that the deeded property is to serve as collateral for the building agreement. We therefore conclude that the contract intends a mortgage. Thus, we must consider whether defendant's signature was required for Brian to enter into a valid mortgage contract.

We are not persuaded that the contract was a purchase money mortgage ("PMM"), which does not require a wife's signature in order to be valid pursuant to MCL 558.4 and *Young v McKee*, 13 Mich 552, 555 (1865). A mortgage is a PMM only when the mortgage is given at the same time as the purchase of the security in a single transaction. MCL 558.4; *Young, supra* at 552. Because Brian acquired the land more than two years before executing the contractors' agreement with plaintiffs, the agreement cannot be considered a PMM. Regardless, Michigan law does not explicitly require a wife's signature for a husband to create a valid mortgage, even if it is not a PMM. Rather, a wife has the right to redeem the mortgaged property upon foreclosure. *Tuller v Detroit Trust Co*, 259 Mich 670, 676; 244 NW 197 (1932). In *Tuller*, as in the instant case, the wife was financially unable to redeem the property. The Court did not question the validity of the mortgage on this basis, despite the fact that the wife effectively lost all rights to the property when she was unable to redeem. *Id.* at 677-679. Thus, we hold that the trial court did not err when it found that Brian's contract with plaintiffs was a valid mortgage. The trial court therefore correctly granted plaintiffs summary disposition because defendant's dower rights were not a valid defense to the foreclosure proceedings as a matter of law. MCR 2.116(C)(9); *Wheeler, supra* at 663.

However, the terms of the trial court's judgment of foreclosure inaccurately stated the parties' rights upon foreclosure. The judgment of divorce, which was entered in February 2003, transformed defendant's dower rights into a \$7,500 money judgment secured by a lien on the property. Therefore, defendant did not retain a right to redeem, and the priority of defendant's lien and plaintiffs' mortgage must be addressed. The prioritization of encumbrances on property is governed by Michigan's race-notice statutes and applicable case law. MCL 565.25; MCL 565.29. Generally, the first-recorded encumbrance takes priority over subsequently recorded instruments. MCL 565.25(4). The order of recording is inapplicable in this case, however, because plaintiffs had notice of defendant's preexisting rights. *Michigan Nat'l Bank v Morren*, 194 Mich App 407, 410-411; 487 NW2d 784 (1992). Moreover, judicial liens on marital property may be enforced as "is necessary to accord complete equity and to conclude the controversy." *Walworth v Wimmer*, 200 Mich App 562, 564; 504 NW2d 708 (1993).

Defendants married in 1993 and separated in April 1999. When plaintiffs executed their mortgage with Brian in November 1999, they were aware of defendants' separation and defendant's forthcoming claims to the property in the divorce action. Plaintiffs therefore had actual notice of defendant's rights. Accordingly, we order the equitable enforcement of defendant's lien as established in the judgment of divorce and in this Court's opinion in the appeal of the divorce action. We note that defendant's lien on the property appears to be her

only security for the amounts awarded in the divorce, and further, that her lien could be rendered valueless if plaintiffs' mortgage takes priority. Furthermore, in May 2004, plaintiffs bought the property subject to defendant's February 2003 lien, and they may not be considered purchasers in good faith because they were aware of defendant's lien. MCL 565.29(4); *Michigan Nat'l Bank, supra* at 410-411. Accordingly, defendant's lien takes priority over plaintiffs' mortgage.

Plaintiffs request that this Court cancel defendant's notice of lis pendens because defendant did not redeem the property within the redemption period. The purposes of notice of lis pendens are to protect the right to litigation regarding real property and to apprise prospective purchasers of disputes about rights in the land. *Kauffman v Shefman*, 169 Mich App 829, 837; 426 NW2d 819 (1988). Because we have resolved defendant's rights regarding the property at issue, and the property has already been sold to plaintiffs at auction, we find that notice of lis pendens is no longer necessary. We therefore order that the notice of lis pendens is canceled.

Lastly, defendant requests that we remand on the issue of attorneys' fees. The judgment of foreclosure awarded fees to plaintiffs to be paid by defendants. Costs are to be allowed to the prevailing party in an action unless otherwise directed by the court or prohibited by statute. MCR 2.625(A)(1). Defendant was never a party to the contractors' agreement. Furthermore, by the time of foreclosure, defendant had become a fellow interest holder who, nonetheless, bore the burden of defending the suit because Brian did not appear. We therefore order that the full costs of prosecution expended by plaintiffs, as determined in the judgment of foreclosure, shall be paid by Brian.

Affirmed.

/s/ Joel P. Hoekstra
/s/ Hilda R. Gage
/s/ Kurtis T. Wilder