STATE OF MICHIGAN

COURT OF APPEALS

COMPANION MORTGAGE CORPORATION, Plaintiff-Appellant, v FIRST NATIONAL BANK OF AMERICA, Defendant-Appellee, and COSTELLO VILLALPANDO and ELAINE VILLALPANDO, Defendants.	UNPUBLISHED January 12, 2006 No. 265185 Lapeer Circuit Court LC No. 03-033619-CH

Before: Bandstra, P.J., and Fitzgerald and White, JJ.

PER CURIAM.

Plaintiff Companion Mortgage Corporation appeals as of right the circuit court's grant of summary disposition to defendant First National Bank of America (FNB) under MCR 2.116(C)(10), in this action to determine the priority of two mortgages relative to two property parcels. We affirm the grant of summary disposition on the claims initially pled, but reverse the court's grant of summary disposition as to the equitable subrogation claim and remand to permit plaintiff to amend its complaint as requested below.

I

Plaintiff filed a complaint under MCL 600.2932 to determine the parties' respective interests to property at 535 Bancroft in Imlay City, Michigan. Plaintiff alleged it was the grantee of a sheriff's deed dated September 11, 2002 and recorded on October 1, 2002 in Lapeer County, and that the sheriff's deed was given as a result of a foreclosure sale following defendant Villalpando's default under a mortgage given on August 12, 1999, and recorded on September 3, 1999, in the amount of $111,600.

The complaint alleged that defendant FNB claimed interest in the Bancroft property by virtue of a sheriff's deed dated October 11, 2002, and that that sheriff's deed was given as a result of a foreclosure sale of an alleged mortgage by defendants Villalpando to defendant FNB dated March 5, 1999. Plaintiff alleged that defendant's mortgage was not properly recorded and

thus did not encumber the Bancroft property as of record. Plaintiff's complaint alleged that having had no constructive notice of defendant's mortgage, plaintiff was a bona fide purchaser (BFP) and is now the owner of the Bancroft property by virtue of the non-redemption of the sheriff's deed, free and clear of any interest of defendant.

Count II of plaintiff's complaint alleged, alternatively, that should the circuit court conclude that plaintiff's interest was inferior or subordinate to defendant FNB's, that the court apply the equitable doctrine of marshalling. Specifically, plaintiff requested that if the court concluded defendant FNB's mortgage encumbered both the Bancroft parcel and another parcel, the Almont Avenue parcel, superior to any interest of plaintiff's, the court should require the sale of the Almont property first to satisfy that mortgage.

Count III alleged that as a result of the defendant Villalpandos' fraud, misrepresentation, and unjust enrichment, plaintiff was entitled to a constructive trust or lien on the Villalpandos' assets and that the balance of the loan/mortgage from the Villalpandos to plaintiff as of 10-31-03 was $135,296.61. The Villalpandos are not parties to this appeal.

Defendant filed a motion for summary disposition of Counts I and II of plaintiff's complaint, arguing that the Register of Deeds satisfied her duties in indexing defendant's mortgage, and that it was thus properly recorded. Regarding plaintiff's count II for marshalling, defendant asserted that plaintiff overlooked the express language of the Bank's mortgage waiving any and all right to have the property marshaled. Defendant FNB argued that because the Bancroft parcel was already encumbered by FNB's mortgages when NCS took its mortgage from the Villalpandos (NCS assigned its mortgage to plaintiff in 2002), plaintiff stood in no better position than its assignor, NCS. Defendant asserted that both mortgages were foreclosed, neither was redeemed, and that under MCL 600.3236, the grantee in a sheriff's deed under a foreclosure takes title to the property foreclosed free of any liens that are junior to the mortgage being foreclosed.

Plaintiff filed a response to defendant's motion, as well as two supplemental briefs, to which defendant filed a reply brief. Both of plaintiff's supplemental briefs argued that plaintiff was entitled to equitable subrogation. Defendant replied:

> The Bank is not going to address the merits of this issue because it is not properly before the court. Companion did not raise this issue in its complaint or any other pleading. Furthermore the doctrine of equitable subrogation has nothing to do with the Bank's motion or with any issue raised previously. It in no way provides Companion with a defense to the Bank's pending motion. Consequently, the Bank urges the court to disregard Companion's brief dated March 15, 2005.

At the hearing on defendant's summary disposition motion, plaintiff orally sought to amend its complaint to add a claim of equitable subrogation. Defense counsel stated at the hearing that it was within the circuit court's discretion to grant the motion, but that the court should deny amendment because the cut-off time for amending pleadings passed months ago and no new facts had come to light. Plaintiff's counsel responded that under MCR 2.116(I)(5), the circuit court must allow amendment.

Counsel argued at the hearing on defendant's motion, after which the circuit court read its opinion from the bench, granting defendant summary disposition of counts I and II of plaintiff's complaint. Plaintiff's counsel then asked for clarification of the ruling, and the court clarified that its summary disposition ruling also pertained to plaintiff's claim of equitable subrogation.

The circuit court's Order Granting Summary Disposition stated:

> For the reasons stated by the Court on the record on June 6, 2005, First National Bank of America's Motion for Summary Disposition is granted as to Counts I and II of the complaint and under plaintiff's claim for equitable subrogation, and First National Bank of America is entitled to the proceeds of the sale of the property[1] at 535 Bancroft, Imlay City, Michigan.

Plaintiff filed a Motion to Amend or Clarify Judgment and Motion for Rehearing or Reconsideration, asserting that the court granted defendant's motion on the equitable subrogation claim when defendant had not addressed the merits of equitable subrogation, and had simply argued that the issue had not been raised in plaintiff's complaint. Plaintiff's motion asserted that the circuit court did not explain why it dismissed the equitable subrogation theory, and that if dismissal was based on plaintiff's failure to plead it in the complaint, the circuit court committed palpable error under MCR 2.116(I)(5) (providing that if summary disposition motion is brought under (C)(8)-(10), the court "shall**"** give opportunity to amend unless the evidence then before courts shows amendment would not be justified). Plaintiff asserted that if the circuit court dismissed the theory on the merits, the record should reflect same or additional findings should be rendered.

Defendant's brief opposing plaintiff's motion to amend/clarify/reconsideration asserted that amendment is governed by MCR 2.118 (which allows amendment w/in 14 days of being served with complaint; or by leave of court or written consent of adverse party or where justice requires), that "**plaintiff has never sought leave of this court to amend its complaint**," and that the circuit court should deny plaintiff's motion for reconsideration. Emphasis added. Defendant went on to argue that "Even plaintiff's current motion does not seek to amend its complaint," but that if the court treated it as a motion to amend, the court should deny the motion because amendment would be futile.

The court denied plaintiff's "motion for reconsideration", its opinion stating:

> Plaintiff asserts that during the hearing on summary disposition, on June 6, 2005, Plaintiff referred to equitable subrogation, and asked this Court to consider it, and even referred to amending its complaint. However careful review of the proceedings and information submitted to this Court revealed that **Plaintiff did not actually ask this Court for leave to amend its complaint.**

---

[1] The parties had stipulated to sell the property at 535 Bancroft, that the proceeds be held in an interest bearing escrow account, and that the proceeds substitute for the real property in this action.

> Pursuant to MCR 2.119(F)(3), a motion for reconsideration that merely presents the same issues ruled on by the court . . . should not be granted . . . In the instant case, this Court committed no error by declining to address the issue and committed no error in failing to grant leave to amend where Plaintiff did not request such leave. . . . [Emphasis added.]

II

On appeal, plaintiff asserts that none of the evidence plaintiff supplied to support equitable subrogation was addressed by the circuit court, and that the circuit court erroneously denied it opportunity to amend to add an equitable subrogation claim. We agree.

This Court reviews the circuit court's grant of summary disposition de novo. *Maiden v Rozwood*, 461 Mich 109; 597 NW2d 817 (1999). A motion under MCR 2.116(C)(10) tests the factual support for a claim. *Auto-Owners Ins Co v Allied Adjusters & Appraisers, Inc*, 238 Mich App 394, 397; 605 NW2d 685 (1999). Summary disposition is appropriate where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. *MacDonald v PKT, Inc*, 464 Mich 322, 332; 628 NW2d 33 (2001).

This Court reviews the circuit court's denial of a request to amend pleadings for an abuse of discretion. *Weymers v Khera*, 454 Mich 639, 654; 563 NW2d 647 (1997). MCR 2.116(I)(5) provides:

> (I) Disposition by Court; Immediate Trial.
>
> (5) If the grounds asserted [in motion for summary disposition] are based on subrule (C)(8), (9), or (10), the court shall give the parties an opportunity to amend their pleadings as provided by MCR 2.118 unless the evidence then before the court shows that amendment would not be justified.

MCR 2.118 provides:

> (1) A party may amend a pleading once as a matter of course within 14 days after being served . . . .
>
> (2) Except as provided in subrule (A)(1), a party may amend a pleading only by leave of the court or by written consent of the adverse party. Leave shall be freely given when justice so requires.

* * *

Although plaintiff's counsel did not expressly state, "I hereby move the court to allow amendment. . .", the record is nonetheless clear that plaintiff's counsel requested leave to amend at the summary disposition hearing:

> MR. RIEDEL: * * *
>
> The other point that they made in their reply brief, Judge, is on the equitable subrogation point. Counsel indicated that I didn't specifically allege in my

> pleadings the doctrine of equitable subrogation. First of all, it was a quiet title action brought under 600.293(5) [sic] says that the action shall be equitable in nature and the summary disposition rule says, your Honor, if you think amendment is appropriate for that particular doctrine, it shall be allowed. That's all I have to say, your Honor. Thank you.
>
> THE COURT: Mr. Backus, any response?
>
> MR. BACKUS: . . . . As to the doctrine of equitable subrogation that, as I indicated in my brief [w]as not raided in the pleadings, and as Mr. Riedel does point out, I think it probably is within the discretion of the Court to allow pleadings if the justice so requires.
>
> However, I would point out, your Honor, this case was filed, I think 20 months ago. The cut-off time for amending pleadings was many months ago, probably six or eight months ago—I don't recall exactly—and for Mr. Riedel to raise this new issue that has not been raised in the pleadings, there are no new facts that have come to light. The facts that were available now were available when he filed this case. They were available before the time for amending pleadings had passed, so I would ask the Court not to allow him to amend the pleadings and that we proceed on the case as is pled. Thank you, your Honor.
>
> MR. RIEDEL: Judge, if I may 2.116(5) [sic], I believe, does not say it's discretionary. I think the word is, "Shall be allowed to amend." Thank you.

The circuit court did not address plaintiff's request to amend at the hearing. On plaintiff's later motion to amend/clarify/reconsideration, the circuit court erroneously concluded that plaintiff **never requested** amendment. Plaintiff did, however, seek leave to amend to add a claim of equitable subrogation, and should have been permitted to do so. MCR 2.116(I)(5).

On the record before us, the circuit court did not address (or apparently consider) the merits of plaintiff's equitable subrogation claim, which plaintiff had briefed in response to defendant's motion for summary disposition. The circuit court's determination to not address the merits of plaintiff's equitable subrogation argument apparently followed automatically from its erroneous conclusion that plaintiff never requested leave to amend. Plaintiff should have been permitted to amend its complaint. We do not address the merits of the equitable subrogation claim, and leave that to the circuit court.

Affirmed in part, and reversed and remanded in part. We do not retain jurisdiction.

/s/ Richard A. Bandstra
/s/ E. Thomas Fitzgerald
/s/ Helene N. White