STATE OF MICHIGAN

COURT OF APPEALS

DARWYN FAIR and VOLANTE COUNCIL FAIR,

Plaintiffs-Counterdefendants-Appellants-Cross-Appellees,

UNPUBLISHED
December 23, 2008

v

No. 278906
Oakland Circuit Court
LC No. 2005-063458-CH

WILLIE MOODY, JASEN COON, GREG PAYNE, FIRST FINANCED MORTGAGE CORP, LAURIE M. MCDONALD, TITLE QUEST INSURANCE AGENCY, and MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC.,

Defendants,

and

LASALLE BANK,

Defendant-Counterplaintiff-Appellee-Cross-Appellant

Before: Murphy, P.J., and Sawyer and Whitbeck, JJ.

PER CURIAM.

Plaintiffs appeal as of right the judgment entered by the trial court following a bench trial in this case arising out of a nefarious real estate transaction orchestrated by various defendants, and allegedly plaintiffs, on August 19, 2004. The transaction involved the purported sale of plaintiffs’ home to defendant Willie Moody for $378,000. A scheduled foreclosure sale of the home was days away when the transaction at issue supposedly took place. Plaintiffs' existing mortgage debt of $260,051, a tax lien in the amount of $23,641, and property taxes and water bills totaling $6,011 were paid off pursuant to a new mortgage obtained by Moody. The chief question at trial was whether plaintiffs actually participated in the closing on their house and executed a purchase agreement, warranty deed, and other closing documents, or whether the closing documents were all forged without plaintiffs having any knowledge of the sale. The trial court, while suggesting that the evidence left it unclear what actually transpired, concluded that the closing documents were forged. The court struck the documents and quieted title in favor of plaintiffs. But the court also imposed an equitable mortgage on the home to the benefit of defendant LaSalle Bank (LaSalle), assignee of the Moody mortgage. The amount of the equitable mortgage awarded by the court was approximately $300,000, not the full amount of the $378,000 loan and mortgage obtained by Moody. The equitable mortgage equaled the amount of plaintiffs' debt that was satisfied by the mortgage funds, which included the payoff of the existing mortgage, tax lien, property taxes, and water bills, plus $9,711 in miscellaneous closing costs. Plaintiffs appeal the trial court's ruling imposing the equitable mortgage in favor of LaSalle.[1] Subject to us holding that the equitable mortgage ruling constituted error, LaSalle cross appeals the trial court's determination that the deed and other real estate closing documents were forged, thereby depriving LaSalle of its status as a mortgagee pursuant to contract without need to resort to equity to recognize and enforce a mortgage. We affirm the imposition of an equitable mortgage, but reduce it by $9,711.

By way of additional background, plaintiffs had repeatedly defaulted on their mortgage with American General Financial Services over a three-year period and multiple foreclosure proceedings had been initiated. The foreclosure proceedings were halted by three Chapter 13 bankruptcy petitions filed by Mrs. Fair that were subsequently dismissed, two voluntarily and one involuntarily, which were followed twice by large payments by plaintiffs that temporarily stopped further foreclosure proceedings. The third bankruptcy filing in 2004 was involuntarily dismissed by the bankruptcy court, and Mrs. Fair was barred by the court from filing a new petition for 180 days. Around this time, the spring and summer of 2004, plaintiffs were faced with a continuing default on the mortgage and yet another foreclosure proceeding. Mr. Fair attempted to refinance through Home Team Mortgage Company and its president Ramsey Zawideh, but refinancing and a new mortgage could only be obtained if the IRS tax lien were subordinated to the new mortgage. As Zawideh assisted Mr. Fair with processing a loan application and negotiated with the IRS for subordination on plaintiffs' behalf, Mr. Fair also began communicating with defendant Jasen Coon, a mortgage broker linked to defendant First Financed Mortgage Corporation (FFMC). Coon was able to procure an adjournment of a foreclosure sale scheduled on August 10, 2004, after Mr. Fair asked Coon for assistance in obtaining an adjournment and Coon supplied American General with a signed purchase agreement, showing a conveyance of plaintiffs' home to Moody. Plaintiffs denied ever executing the purchase agreement, and Mr. Fair testified that he did not know how Coon was able to negotiate an adjournment of the sale. The new date set for the foreclosure sale was August 24, 2004, giving, from American General's perspective, time for plaintiffs to close on the sale with Moody.

The home was purportedly sold on August 19, 2004, to defendant Moody for $378,000 pursuant to a new mortgage with defendant Mortgage Electronic Registration Systems, Inc.

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[1] Plaintiffs essentially desire to retain ownership of the home without the burden of any mortgage or tax lien despite the fact that they paid nothing toward those debts and were on the verge of foreclosure.

(MERS), acting solely as a nominee for lender BNC Mortgage, Inc.,[2] resulting in satisfaction of the American General mortgage ($260,051), the IRS tax lien ($23,641), and other debts, including an unsecured loan in the amount of nearly $80,000 supposedly held by FFMC, as invoiced by Coon.[3] The buyer's closing took place at the offices of defendant Title Quest, with Coon and Moody present, and under the auspices of a Title Quest agent and closer, defendant McDonald, who also served as the notary. According to McDonald, the sellers' closing took place at plaintiffs' home later in the day with plaintiffs, Coon, and herself being present, at which time plaintiffs executed the warranty deed and all of the closing documents.[4] Plaintiffs testified that there was no closing in their home, that Coon and McDonald had never been in their home, that plaintiffs never executed a purchase agreement, warranty deed, or any closing documents, that they never authorized anyone to sell the house, that they had no plans to sell the house, and that they did not sell the house to Moody; it was a blanket denial to any transaction having occurred. Evidence was presented regarding various email and fax communications between Mr. Fair and Coon on August 19 and 20, 2004, which, at a minimum, seem odd and puzzling, given plaintiffs' claims. MERS and, following intervention and substitution, LaSalle proceeded on the theory that plaintiffs' plan was to sell the house to Moody and for Moody then to sell the home back to plaintiffs on a land contract for $325,000;[5] a plan emphatically denied by plaintiffs who pointed to their attempts to obtain refinancing through Zawideh and Home Team Mortgage.[6] According to MERS and LaSalle, this plan would give plaintiffs some time to find new financing and, when financing was obtained, plaintiffs would purchase the fee or legal title back from Moody.

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[2] LaSalle is an assignee of BNC and MERS.

[3] Evidence presented at trial made it clear that there was no such unsecured loan. Defendants FFMC, Coon, Moody, and Payne, who was an associate of Coon and also linked to FFMC, all answered the complaint, as well as the amended complaint, and participated in the early stages of the trial, with Payne and Moody providing some testimony. However, on the third day of the trial, all three individual defendants invoked their Fifth Amendment right against self-incrimination. Along with FFMC, they subsequently formally withdrew theirs answers, and default judgments were later entered against all four defendants. We further note that defendants Title Quest and McDonald settled with plaintiffs before trial commenced.

[4] There was testimony and a sketch by McDonald regarding the layout of plaintiffs' home that was consistent with plaintiffs' description of their home, including identification of a black refrigerator.

[5] Coon faxed Mr. Fair a land contract on August 20, signed by Moody and notarized by McDonald, which she denied notarizing, but the space designated for Fair's signature on the land contract is blank. Mr. Fair testified repeatedly that he wanted nothing to do with any deal suggested by the land contract, but he did not feel the need to reply to Coon's faxing of the land contract, despite the fact that the contract showed Moody selling plaintiffs' house back to Fair.

[6] Zawideh expressed disbelief when he discovered that the house had been sold, as he felt that he was close to obtaining subordination of the IRS tax lien, although he conceded that procuring subordination from the IRS was very difficult.

After the purported transaction, Moody failed to make payments on the new mortgage, nor did plaintiffs make any mortgage or land contract payments. In January 2005, after allegedly first learning of the purported transaction, plaintiffs filed suit. Pursuant to an amended complaint filed in November 2005, plaintiffs sought to quiet title and additionally alleged fraud, emotional distress, and unlawful notarization. Plaintiffs also requested injunctive relief barring MERS from foreclosing on the property. In March 2005, plaintiffs became entangled in a district court action brought by Moody seeking an order of eviction against plaintiffs for forfeiture of the land contract. The district court entered an order staying the eviction proceedings until the current litigation was concluded in the circuit court. Plaintiffs, however, were ordered to make monthly escrow payments in the amount of $2,771, which they did for four months before stopping, without court authorization, when MERS initiated foreclosure proceedings in light of the fact that no payments were being made on the new mortgage.

The litigation in this case entailed a seven-day bench trial in which numerous exhibits were admitted, including real estate documents and copies of emails, and the court took testimony from plaintiffs, Payne, Moody, Coon (deposition transcript only), McDonald, Zawideh, Blake Bradsher (branch manager for American General), and Duanne Barber (testified regarding business meeting with Mr. Fair at local restaurant on August 19, 2004).[7] The trial court also heard from plaintiffs' handwriting expert, Michael Sinke, who testified that his analysis positively eliminated plaintiffs as authoring the signatures on the closing documents. LaSalle's handwriting expert, Todd Welch, testified that he could not come to a conclusion one way or the other following his analysis. Both experts compared known exemplars against the signatures on the closing documents. For the most part, the signatures at issue looked nothing like the exemplars, and the "n" at the end of Mr. Fair's first name was missing on all of the challenged signatures, while being included on all of the exemplars.[8] Both experts noted that, while their was some fluency in Mrs. Fair's exemplars and her purported signatures, the signatures on the documents at issue showed signs of many stops and starts, hesitation, slowness, pen lifts, and blunt beginning and ending strokes. This would be typical of a simulated forgery, i.e., one in which the forger from memory or observation tries to recreate the signature so that it appears similar to a true signature. Welch opined that the challenged signatures showed clear signs of simulated forgeries, given the stops and starts, slowness, and pen lifts, but the problem was that they looked nothing like the exemplars. Although Welch's analysis was inconclusive, he opined that the signatures at issue lent themselves to being disguised or auto forgeries, i.e., an attempt by a person to sign his or her name in a style different than normal so that the signature could be disavowed later. Sinke disagreed that these were disguised or auto forgeries.

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[7] The court heard much testimony regarding the events that transpired, or that supposedly transpired, on August 19, 2004. We note that the timelines testified to by Barber regarding his restaurant meeting with Mr. Fair, in which Fair reviewed some legal documents, is inconsistent with Mr. Fair's testimony regarding timelines.

[8] We note that Mr. Fair's signature on a Home Team Mortgage loan application, which he conceded was his signature, was also missing an "n," although, again, none of his exemplars from that time period revealed a missing "n." The evidence reflected that the loan application omitted information regarding the tax lien and various judgment liens.

The trial court ruled as indicated above, and plaintiffs appeal as of right the imposition of an equitable mortgage, while LaSalle cross appeals on the possibility that we reverse the trial court's imposition of an equitable mortgage.[9]

This Court reviews a trial court's findings of fact in a bench trial for clear error and its conclusions of law de novo. *Alan Custom Homes, Inc v Krol*, 256 Mich App 505, 512; 667 NW2d 379 (2003), citing MCR 2.613(C) and *Chapdelaine v Sochocki*, 247 Mich App 167, 169; 635 NW2d 339 (2001). Similarly, equitable decisions are reviewed de novo, and the underlying factual findings made by the trial court in support of its equitable rulings are subject to the clearly erroneous standard of review. *Wengel v Wengel*, 270 Mich App 86, 91; 714 NW2d 371 (2006). In the application of the clearly erroneous standard, "regard shall be given to the special opportunity of the trial court to judge the credibility of the witnesses who appeared before it." MCR 2.613(C). A finding is clearly erroneous when, although there is evidence to support it, the reviewing court on the entire record is left with the definite and firm conviction that a mistake was made. *Walters v Snyder*, 239 Mich App 453, 456; 608 NW2d 97 (2000). Questions of law, in general, are reviewed de novo. *Richards v Tibaldi*, 272 Mich App 522, 528; 726 NW2d 770 (2006). Plaintiffs also raise issues regarding the trial court's decision allowing LaSalle to intervene in the action and substitute in for MERS and allowing LaSalle to file a counterclaim.[10] A trial court's decision on a motion to intervene or for substitution of a party is reviewed for an abuse of discretion. *Vestevich v West Bloomfield Twp*, 245 Mich App 759, 761; 630 NW2d 646 (2001); *Mather Investors, LLC v Larson*, 271 Mich App 254, 260; 720 NW2d 575 (2006). A trial court's decision on a motion to add a counterclaim is likewise reviewed for an abuse of discretion on appeal. See *Weymers v Khera*, 454 Mich 639, 658; 563 NW2d 647 (1997). An abuse of discretion occurs when the trial court chooses an outcome falling outside a principled range of outcomes. *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006).

We first address procedural issue raised by plaintiffs. Plaintiffs argue that the trial court erred in allowing LaSalle to intervene after the start of trial. Plaintiffs maintain that MERS, as the mortgagee and entity that initiated foreclosure proceedings, was the proper party to be named in the suit, that MERS was carrying out the litigation without any contention that LaSalle should have been a named defendant, that LaSalle's interest was adequately protected by MERS, and that LaSalle had notice of the pendency of the action prior to trial but did not act at that point, nor in a timely manner in general. LaSalle argues that plaintiffs suffered no prejudice when the court allowed LaSalle to intervene and substitute in for MERS, that it was a necessary party but

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[9] With respect to the cross appeal, LaSalle argues that plaintiffs did not establish a claim of forgery by clear and convincing evidence. LaSalle states, "In the event that this Court concludes that an equitable mortgage in favor of LaSalle Bank was not warranted, the circuit court's opinion and order should be reversed and judgment should be entered in favor of LaSalle Bank on Plaintiffs' claim to quiet title." Because we affirm the imposition of an equitable mortgage, while reducing it slightly, it is unnecessary to reach the issue on cross appeal. We do note that our close inspection of the record leads us to cast some doubts regarding plaintiffs' position that they had no role in the real estate transaction.

[10] LaSalle's counterclaim initially alleged causes of action for unjust enrichment and an equitable mortgage, and an amended counterclaim added a claim of equitable subrogation.

not named as a party by plaintiffs, that it has an interest in the property that LaSalle is entitled to protect, that MERS was merely a nominee and not an authorized agent or representative of LaSalle, and that any judgment against MERS would have been binding on LaSalle under MCR 3.411(H).[11]

The mortgage obtained by Moody indicates that MERS is a separate corporation that is acting solely as a nominee for the lender, BNC Mortgage, and the lender's successors and assigns. The mortgage also indicates that MERS is the mortgagee under the security instrument. Plaintiffs did not initially name any mortgagee as a defendant in the complaint because no foreclosure proceedings on the Moody mortgage had commenced, but when they did, plaintiffs filed an amended complaint in November 2005 naming MERS as a defendant. Plaintiffs also obtained a stipulated order in October 2005 allowing BNC to be added as a party defendant; however, plaintiffs never followed up on bringing BNC into the litigation. The notice of foreclosure is in the name of MERS as nominee of the lender and states that MERS is the mortgagee. A final pretrial order signed days before trial commenced provides that plaintiffs did not contest that Moody executed a promissory note in favor of lender BNC, that Moody executed a mortgage in favor of MERS as nominee for BNC, that BNC subsequently endorsed the note to LaSalle, and that MERS is also the nominee of LaSalle, who is the current holder of the note and mortgage executed by Moody. Five days of trial took place in March of 2006 with MERS participating as a defendant and LaSalle not participating as a party. The trial was adjourned and set to be continued in July 2006 and, in May 2006, LaSalle filed a motion to intervene as a party defendant "on behalf of LaSalle Bank, National Association, the Trustee of Structured Asset Investment Loan Trust Mortgage Pass-Through Certificates Series 2004-10." MERS filed a motion agreeing to LaSalle's intervention, indicating that it held the mortgage for the benefit of LaSalle. MERS also stated that on May 18, 2006, it executed a corporate assignment of mortgage in favor of LaSalle relative to the Moody promissory note and mortgage. The document was provided to the court.[12] Accordingly, MERS asked the court to allow LaSalle to substitute in for MERS. The trial court granted the motion to intervene and allowed LaSalle to substitute in for MERS. The parties do not provide any insight regarding the legal parameters with respect to a lender's nominee or the nature of MERS.

To our knowledge, there is no published Michigan case law substantively addressing lender nominees and MERS. In *MERSCORP, Inc v Romaine*, 8 NY3d 90, 96; 861 NE2d 81; 828 NYS2d 266 (2006), the New York court explained:

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[11] MCR 3.411(H) provides that "[e]xcept for title acquired by adverse possession, the judgment determining a claim to title, equitable title, right to possession, or other interests in lands under this rule, determines only the rights and interests of the known and unknown persons who are parties to the action, and of persons claiming through those parties by title accruing after the commencement of the action."

[12] No document was ever provided showing the "endorsement" or an assignment as between BNC and LaSalle. The document assigning the mortgage from MERS to LaSalle does state that it was a mortgage executed by Moody to BNC Mortgage.

> In 1993, the MERS system was created by several large participants in the real estate mortgage industry to track ownership interests in residential mortgages. Mortgage lenders and other entities, known as MERS members, subscribe to the MERS system and pay annual fees for the electronic processing and tracking of ownership and transfers of mortgages. Members contractually agree to appoint MERS to act as their common agent on all mortgages they register in the MERS system.
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> The initial MERS mortgage is recorded in the County Clerk's office with "Mortgage Electronic Registration Systems, Inc." named as the lender's nominee or mortgagee of record on the instrument. During the lifetime of the mortgage, the beneficial ownership interest or servicing rights may be transferred among MERS members (MERS assignments), but these assignments are not publicly recorded; instead they are tracked electronically in MERS's private system. In the MERS system, the mortgagor is notified of transfers of servicing rights pursuant to the Truth in Lending Act, but not necessarily of assignments of the beneficial interest in the mortgage. [Footnotes omitted.]

In *Landmark Nat'l Bank v Kesler*, 192 P3d 177, 179 (Kan App, 2008), the Kansas appellate court stated that MERS mortgages designate an entity, MERS, as the mortgagee even though it is not the lender, which left the court pondering whether MERS truly is a mortgagee even though it lent no money nor had any rights to loan repayments. MERS argued in *Kesler* that it was a necessary party to foreclosure proceedings and not just the lender, claiming it held title to the mortgage, although not the real estate. *Id.* The Kansas court held that MERS was merely an agent for the lender and that the lower court did not err in not allowing intervention by MERS, given that MERS was not the lender, despite being labeled as mortgagee, had no right to repayment of the underlying debt, and had no role in handling mortgage payments.

Kesler would suggest that MERS here need not have been included in the litigation commenced by plaintiffs and that BNC and then LaSalle were the parties holding the interest that properly would be subject to the injunctive relief sought by plaintiffs. We, however, find it unnecessary for our purposes to define MERS' interest, MERS' relationship to BNC and LaSalle, or to define the relationship between MERS and Moody. Before trial, plaintiffs agreed that BNC endorsed the note to LaSalle, that MERS was the nominee of LaSalle, and that LaSalle was the current holder of the note and mortgage executed by Moody. LaSalle should have been named as a party defendant and, considering that MERS later assigned whatever interest it had in the mortgage to LaSalle, it is unquestionable that LaSalle ultimately held the interest that would be compromised by an unfavorable ruling by the trial court.

We conclude that the trial court did not abuse its discretion in allowing LaSalle to intervene and substitute in for MERS. LaSalle had a right to intervene, where it claimed an interest relating to the property and the transaction that was the subject of the action, and where it was so situated that the disposition of the action may as a practical matter have impaired or impeded LaSalle's ability to protect that interest. MCR 2.209(A)(3). Further, LaSalle' interest would not have adequately been represented by MERS. *Id.* Although LaSalle does not appear to dispute plaintiffs' contention that it was aware of the litigation in January 2006, calling into question the timeliness of LaSalle's motion, MCR 2.209(A)("[o]n timely application"), the motion was filed a short few months later, MERS did not assign its interest to LaSalle until May of 2006, plaintiffs never pursued the matter despite knowing of LaSalle's interest, and absolutely no prejudice occurred to plaintiffs even after five days of trial had been completed. Moreover, inclusion of LaSalle in the suit was proper under MCR 2.205(A)(necessary joinder), where LaSalle had such an interest in the subject matter of the action that its presence was essential to permit the court to render complete relief. Furthermore, substitution on the basis of transfer of interest was appropriate under MCR 2.202(B).[13]

Plaintiffs also assert that the trial court erred in allowing LaSalle to file a counterclaim. LaSalle attached a proposed answer and counterclaim to its motion to intervene. The proposed counterclaim alleged claims of unjust enrichment and equitable mortgage. While the trial court granted the motion to intervene, it denied LaSalle's request to file a counterclaim, finding it untimely. More than a month before trial resumed, LaSalle filed a motion for reconsideration relative to the denial of the counterclaim request. On the second to last day of trial on July 6, 2006, the court ruled on the motion, changing its position and allowing the filing of a counterclaim. The trial court reasoned that no additional witnesses would need to testify because of the counterclaim, no adjournment was being sought, no further discovery was necessary, and the filing of a counterclaim would not delay conclusion of the trial. The formal order granting reconsideration and an amended counterclaim were not filed until after trial, but before the court issued its written opinion in the case. Plaintiffs complain that the counterclaim was inexcusably untimely and that no palpable error was demonstrated for purposes of the motion for reconsideration. Plaintiffs and LaSalle view this issue as one involving amendment of the pleadings, and plaintiffs wish to attribute the entire time period that MERS was in the litigation to LaSalle with respect to examining the length of the delay. MERS never filed a counterclaim.

We first note that this is not a case concerning amendment of the pleadings, considering that LaSalle sought to file an answer and counterclaim immediately on intervention; there was nothing to amend. Further, plaintiffs cite no authority for their proposition that LaSalle is tied to the pleadings filed by MERS. Under MCR 2.209(C)(2), a motion to intervene must "be accompanied by a pleading stating the claim or defense for which intervention is sought." LaSalle attached such pleadings, an answer and a counterclaim, to its motion to intervene. Generally speaking, a counterclaim must be filed with an answer. MCR 2.203(E). Again, this was effectively accomplished by attaching an answer and counterclaim to the motion to intervene. LaSalle could not file a counterclaim before intervention, and we have already determined that intervention was proper. Furthermore, demonstrating palpable error was not required in order for the court to reconsider its prior ruling. MCR 2.119(F)(3) provides:

> Generally, *and without restricting the discretion of the court*, a motion for rehearing or reconsideration which merely presents the same issues ruled on by the court . . . 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

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[13] We also note that the order granting intervention and substitution is entitled a "stipulated order," and there were statements made at the hearing on the motion suggesting that plaintiffs were not fighting the substitution of LaSalle for MERS, only the introduction of a counterclaim attached to the motion. To that extent, the issue was waived.

different disposition of the motion must result from correction of the error. [Emphasis added.]

A trial court can, and did so here, give a party a second chance or rethink its position, and nothing in MCR 2.119(F)(3) precludes a trial court from exercising such discretion. *Kokx v Bylenga*, 241 Mich App 655, 659; 617 NW2d 368 (2000). While it would have been preferable for the court to grant the request when initially made, doing so on reconsideration was permissible.

Even if we treated this issue as one involving amendment of the pleadings, we find no undue delay, bad faith, dilatory motives, repeated failures to cure deficiencies by previous amendments, undue prejudice to the opposing party, or futility. MCR 2.118(A)(2); *Weymers, supra* at 658. Plaintiffs speak of prejudice to their case, but they fail to explain how they were prejudiced, nor do we see any prejudice. The evidence that would support or run contrary to an equitable mortgage was necessarily encompassed by the extensive and fully developed evidence presented at trial regarding the nature of the transaction and the actions of the parties, which related to the claims pursued by plaintiffs. We additionally note that, even had there been no counterclaim, the trial court was faced with a request by plaintiffs to enjoin enforcement of the mortgage and foreclosure proceedings, and we do not believe that it would have gone beyond the court's equitable authority to reject the request on the basis that LaSalle was entitled to an equitable mortgage, thereby granting LaSalle the same relief sought in the counterclaim.

We now turn to the substantive issues presented on appeal. The trial court found that the warranty deed and closing documents had been forged, and it struck those documents. When a deed is forged, those ostensibly acquiring an interest under the forged deed, even innocently, are in no better position with respect to title than if the acquisition of the interest was with notice of the forgery. *Felcher v Dutton*, 265 Mich 231, 233; 251 NW 332 (1933)("The mortgage to the loan association rests on a deed which is in effect a forgery and at any rate is null and void.); *Horvath v Nat'l Mortgage Co*, 238 Mich 354, 360; 213 NW 202 (1927); *Special Prop VI, LLC v Woodruff*, 273 Mich App 586, 591; 730 NW2d 753 (2007); *Horton v Verhelle*, 231 Mich App 667, 677; 588 NW2d 144 (1998), overruled in part on other grounds in *Smith v Globe Life Ins Co*, 460 Mich 446 (1999); *VanderWall v Midkiff*, 166 Mich App 668, 685; 421 NW2d 263 (1988). There is no such thing as a bona fide holder under a forged deed, whose good faith would confer a right against the party whose name was forged, or those claiming under him or her. *Felcher, supra* at 233; *Horvath, supra* at 360; *Special Prop VI, supra* at 591; *Horton, supra* at 677; *VanderWall, supra* at 685. Therefore, LaSalle cannot rely on the deed, new mortgage, or any closing documents as against plaintiffs to establish an enforceable mortgage.

With respect to equitable mortgages, "[a] court of equity may impose and foreclose an equitable mortgage on a parcel of real property when no valid mortgage exists but some sort of lien is required by the facts and circumstances of the parties' relationship." 1 Cameron, *Michigan Real Property Law* (3d ed), Mortgages, § 18.5, p 681. In *Schram v Burt*, 111 F2d 557, 562 (CA 6, 1940), the United States Court of Appeals for the Sixth Circuit observed:

> The whole doctrine of equitable mortgages is founded upon the ancient, cardinal maxim of equity which regards that as done which was agreed to be done and should have been done and in applying this rule the court will treat the subject matter as to collateral consequences and incidences as if the acts contemplated by

> the parties had been done at the beginning of the transaction, always regarding the substance and not the form.

"Generally an equitable mortgage will be imposed if it is shown that there was an intention to place a lien on the real estate or a promise that the real estate would be used as security but for some reason the intended purpose was not accomplished." Cameron, *supra* at § 18.5, pp 681-682. An equitable lien or mortgage generally arises from an agreement that identifies the property and reflects an intention that the property will be security for an obligation. *In re Moukalled Estate*, 269 Mich App 708, 719; 714 NW2d 400 (2006). "In an equitable action, a trial court looks at the entire matter and grants or denies relief as dictated by good conscience." *Id.* Equity will declare a lien or mortgage on considerations of right and justice and those maxims that lie at the foundation of equity jurisprudence, where a written mortgage contract is lacking but the parties' conduct and relationship demands application of equitable principles. *Senters v Ottawa Savings Bank, FSB*, 443 Mich 45, 53; 503 NW2d 639 (1993). In *Senters, supra* at 53-54, our Supreme Court, quoting *Cheff v Haan*, 269 Mich 593, 598; 257 NW 894 (1934), stated that "'[e]quity will create a lien only in those cases where the party entitled thereto has been prevented by fraud, accident or mistake from securing that to which he was equitably entitled.'" We conclude that equitable principles dictate the imposition of an equitable mortgage under the circumstances of this case.

An equitable mortgage case that is almost directly on point is *Richardson v Richardson*, 266 Mich 194; 253 NW 265 (1934), wherein the plaintiff executed and delivered a warranty deed on her farm to her son and daughter-in-law, who then proceeded to give a mortgage on the property to People's State Bank incident to a loan of $4,000. The plaintiff then sought cancellation of the deed and mortgage on the ground that her son had induced her to sign the deed by means of a trick and false representations. The plaintiff's theory in her complaint was that the deed obtained by trick and false representations was "in effect a forged instrument which vested no rights whatever in the grantees or in the subsequent mortgagee." *Id.* at 195. The Supreme Court affirmed the circuit court's finding that the deed should be held void and cancelled as the proofs fully sustained that conclusion. *Id.* at 196. But the *Richardson* Court reversed the circuit court's ruling that the plaintiff was also entitled to have the bank's mortgage cancelled, explaining:

> Because the deed was found to be invalid as to the grantees, the circuit judge concluded that plaintiff was also entitled to have the mortgage to the People's State Bank of Belleville canceled. In so holding he relied upon *Horvath v National Mortgage Co*, 238 Mich 354 (56 ALR 578). We think decision in the Horvath Case is not controlling of the rights of the People's State Bank in the instant case. Except as hereinafter noted, in the former case the money obtained by the mortgage loan did not inure in any way to the benefit of the plaintiff who sought cancellation of the mortgage. *But in the instant case the proceeds of the mortgage loan were used in part, at least, to pay a past-due mortgage on plaintiff's farm, accrued interest thereon, past-due taxes, and to make improvements or repairs on the farm buildings*. The items are as follows: Principal of farm mortgage, $1,350; interest thereon, $195; past-due taxes, $478.35; improvements and repairs, $121; total, $2,144.35. Under plaintiff's own testimony she understood that her son Ross acting for her was, in some way, to

take care of the various obligations above noted. In so doing the son, in effect, acted as plaintiff's agent. Interest on the Ross Richardson mortgage was paid to December 13, 1930. From that date the People's State Bank of Belleville is entitled to interest at 7 per cent., as provided in the mortgage, on the computed amount of $2,144.35. Plaintiff is in a court of equity seeking equitable relief. Such relief will not be granted except on condition of plaintiff's doing equity.

> "Equitable relief by way of cancellation is not strictly matter of right, but rather remedy the granting of which rests in sound discretion of court; and rescission should not be granted where result thus obtained would be unjust or inequitable." *Amster v Stratton* (syllabus), 259 Mich 683.
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> To the extent above indicated the money received upon the mortgage given by Ross Richardson and his wife to the People's State Bank has inured to the direct benefit of plaintiff, and for the most part was used to relieve her property from the liens of a past due mortgage and unpaid taxes. Plain everyday honesty forces the conclusion that the People's State Bank to the extent indicated is entitled to have its mortgage lien declared to be valid and existing as such. [*Richardson, supra* at 196-198 (emphasis added).]

Here, the $378,000 loan and accompanying mortgage obtained by Moody inured, partly, to the direct benefit of plaintiffs with respect to that amount that went to paying off the underlying American General mortgage, the IRS tax lien, the property taxes, and the water bills. We do agree with plaintiffs that the miscellaneous closing costs in the amount of $9,711, which was included in the court's computation of the equitable mortgage, should not have been included because the payment did not inure to plaintiffs' benefit. Given the trial court's ruling of a forged transaction, it would hardly be equitable to make plaintiffs accountable for the closing costs. In its appellate brief, LaSalle does not make any argument in response to plaintiffs' claim that, minimally, the equitable mortgage should be reduced by $9,711. Accordingly, we reduce the equitable mortgage by $9,711.

Plaintiffs raise numerous arguments in challenging the trial court's ruling, but we find them unavailing. Plaintiffs argue that the trial court erred in finding that they had unclean hands on the basis of the bankruptcy petitions and the failure to continue making escrow payments to the district court. Plaintiffs continue the argument by correctly contending that, even if those actions were improper, they had no relationship to the real estate transaction and resulting mortgage. The "clean hands" doctrine was discussed by this Court in *McFerren v B & B Investment Group*, 253 Mich App 517, 522-523; 655 NW2d 779 (2002), wherein the Court stated:

> A court acting in equity looks at the whole situation and grants or withholds relief as good conscience dictates. A party seeking the aid of equity must come in with clean hands. The clean hands maxim is a self-imposed ordinance that closes the doors of a court of equity to one tainted with inequitableness or bad faith relative to the matter in which he seeks relief, however improper may have been the behavior of the defendant. The clean hands doctrine applies to quiet-title actions. [Citations and quotations omitted.]

First, we do not find any basis to conclude that BNC, MERS, or LaSalle had unclean hands such that an equitable mortgage should be denied. With regard to plaintiffs, we do believe that the multiple bankruptcy petitions were questionable, given the failure to file, in all three proceedings, any Chapter 13 plan, bankruptcy schedules A-J, and a statement of financial affairs, and considering the order of the bankruptcy court temporarily precluding new filings. Also, while there may have been a sound reason to stop making escrow payments to the district court in the eviction action, i.e., Moody's failure to use that money to pay toward the new mortgage resulting in foreclosure proceedings, the proper process would have been to seek the appropriate order from the district court and not unilaterally decide to halt payments. There is some merit, however, to plaintiffs' argument that the bankruptcy filings and failure to continue making escrow payments were wholly unconnected to the forged real estate transaction. Regardless, we find that issues regarding the bankruptcy petitions and the escrow payments are essentially irrelevant for purposes of determining the legitimacy of the equitable mortgage. None of the authorities cited above with respect to the law of equitable mortgages state that an equitable mortgage is only appropriate if the equitable mortgagors have unclean hands. Indeed, *Richardson, supra*, the main case upon which we rely, involved imposing an equitable mortgage on the property of a party who engaged in absolutely no improper or unethical conduct. It was the fact that the mortgage, in part, inured to her benefit and that the bank did not engage in improper conduct that supported the imposition of an equitable mortgage.

Plaintiffs accurately cite the principle that benefit alone is not the test for a court of equity to impose a quasi or constructive contract. *Belle Isle Grill Corp v Detroit*, 256 Mich App 463, 478; 666 NW2d 271 (2003). Plaintiffs, however, fail to acknowledge the additional component, which is that an inequity must also result. *Id.* Here, an inequity would result if LaSalle were not allowed to somewhat recoup monies paid out under the mortgage.

Plaintiffs also argue that adverse inferences should have been recognized with respect to Coon, Moody, and Payne because they invoked their Fifth Amendment rights. In *Phillips v Deihm*, 213 Mich App 389, 399-400; 541 NW2d 566 (1995), this Court stated:

> The privilege against self-incrimination not only permits a person to refuse to testify against himself at a criminal trial in which he is a defendant, but also permits him not to answer official questions put to him in any other proceeding, civil or criminal, formal or informal, where the answers might incriminate him in future criminal proceedings. However, the Fifth Amendment does not forbid adverse inferences against parties to civil actions when they refuse to testify in response to probative evidence offered against them: the amendment does not preclude the inference where the privilege is claimed by a party to a civil cause. [Citations omitted.]

We first note that Coon's deposition transcript was admitted into evidence and that Payne and Moody did provide some testimony before invoking the Fifth Amendment. Regardless, we question the relevance of plaintiffs' argument to the issue of an equitable mortgage. The trial court struck the closing documents, finding them to be forged. Any adverse inferences arising from Coon, Moody, and Payne invoking the Fifth Amendment would have led to this same conclusion. Plaintiffs' argument does not merit reversal.

Plaintiffs also argue that all of the allegations in their complaint in regard to Coon, Moody, Payne, and FFMC should have been accepted or admitted as true because those parties all defaulted and that LaSalle had no standing to challenge such admissions. A default judgment is a conclusive adjudication and is just as binding on the parties relative to matters essential to support the judgment as a judgment that has been rendered following an answer and litigation. *Barnes v Jeudevine*, 475 Mich 696, 705; 718 NW2d 311 (2006). It is an established principle of law that the entry of a default settles the question of liability with regard to all well-pleaded allegations and precludes the defaulting party from engaging in litigation over liability. *Kalamazoo Oil Co v Boerman*, 242 Mich App 75, 79; 618 NW2d 66 (2000). Again, as with the argument concerning invocation of the Fifth Amendment, we fail to see what plaintiffs hope to accomplish with this argument, given that the trial court struck the closing documents and concluded that a forged transaction occurred. There is no correlation to the equitable mortgage, and there was no evidence suggesting that BNC, MERS, or LaSalle had anything to do with the alleged malfeasance perpetrated by Coon, Moody, Payne, and FFMC. Moreover, plaintiffs are simply wrong in maintaining that LaSalle lacked standing, in light of the defaults, to argue that plaintiffs executed the closing documents and participated in the sale. An admission to liability predicated on the entry of a default operates solely against the particular party who defaulted; it does not bind a codefendant who appears and contests the litigation. *Allstate Ins Co v Hayes*, 442 Mich 56, 73 n 20; 499 NW2d 743 (1993); *Klimmer v Klimmer*, 66 Mich App 310, 313; 238 NW2d 586 (1975). Indeed, even “where a party’s sole source of liability is vicarious, a default entered against a coparty does not preclude the former from contesting its vicarious liability.” *Rogers v J B Hunt Transport, Inc*, 466 Mich 645, 655; 649 NW2d 23 (2002). Plaintiffs' accompanying argument that the doctrine of collateral estoppel barred LaSalle from challenging the admissions resulting from the defaults is, aside from being irrelevant to the equitable mortgage issue, barely worthy of comment. Collateral estoppel relates to multiple lawsuits and has no application here. See *Monat v State Farm Ins Co*, 469 Mich 679, 692-693; 677 NW2d 843 (2004)(collateral estoppel is intended to relieve parties of the cost and vexation of multiple lawsuits). Reversal is unwarranted.

Plaintiffs further argue that because the warranty deed was forged even an equitable mortgage cannot be ordered by the court. Plaintiffs rely on *Lee v Kellogg*, 108 Mich 535, 536; 66 NW 380 (1896), for this proposition, wherein the Court stated, "Forged papers cannot be made the basis of a recovery, either at law *or in equity*, against the supposed maker, or those in good faith holding and owning the genuine papers." (Emphasis added.) *Lee* addressed a situation in which a mortgagee assigned a mortgage and notes to an assignee and then forged a like mortgage and notes for assignment to another assignee who accepted them in good faith. The Court found that the assignee of the forged documents acquired no rights as against the assignee of the genuine documents. We first find that *Lee* is factually distinguishable in that it dealt with two innocent mortgage assignees and ascertainment of their rights as against each other, neither of whom received a windfall to the detriment of the other. The case has no application to the concept of an equitable mortgage under the facts presented in the case at bar. The forged papers here are not being made the basis of the recovery; rather, the basis of recovery was the fact that plaintiffs had major debts paid off without spending a penny through use of lender monies and, if plaintiffs had their way, to the detriment of the lender. To the extent that *Lee* may support plaintiffs' argument, it conflicts with *Richardson*, *supra*, which is a more recent pronouncement on equitable mortgages and thus controlling. *Washington Mut Bank, FA v*

ShoreBank Corp, 267 Mich App 111, 119; 703 NW2d 486 (2005) ("We are obligated to follow the most recent pronouncement of the Supreme Court on a principle of law.").

Plaintiffs next launch into a discussion regarding why LaSalle is not entitled to any relief under the doctrines of unjust enrichment and equitable subrogation, which subrogation claim was included in the amended counterclaim. Considering that the trial court did not award relief to LaSalle under either doctrine and that LaSalle does not challenge the court's failure to do so, it is simply not necessary to address this argument.

Finally, plaintiffs argue that LaSalle was not a good faith purchaser or assignee, nor a holder in due course, where it acquired its interest after the lawsuit was filed with full knowledge of the forgery claims; therefore, LaSalle took the assigned mortgage subject to plaintiffs' claims that the mortgage was not valid and that an equitable mortgage could not be awarded. Plaintiffs place reliance on MCL 440.3302, which defines a holder in due course, and MCL 440.3306, which provides that a person who is not a holder in due course takes an instrument subject to a property or possessory right in the instrument.

We first note that MCL 440.3302 and MCL 440.3306 are part of the Uniform Commercial Code (UCC) on Negotiable Instruments, MCL 440.3101 *et seq.*, and "[a] mortgage instrument is not a negotiable instrument." *Mox v Jordan*, 186 Mich App 42, 46; 463 NW2d 114 (1990), citing MCL 440.3104(1). Moreover, we are not addressing competing mortgage interests. We fail to see, and plaintiffs fail to adequately explain, how the UCC has any application to or bearing on whether LaSalle was entitled to an equitable mortgage. We do agree that equity, for purposes of an equitable mortgage, could require consideration in some instances of the fact that a party seeking recognition of an equitable mortgage acquired its interest knowing of litigation regarding the validity of the underlying real estate transaction. Plaintiffs point to the lack of documentary evidence concerning any transfer of the mortgage interest from BNC to LaSalle. As reflected in the pretrial order, however, plaintiffs agreed that BNC endorsed the documents to LaSalle. When this took place is not revealed in the record; it is possible that it occurred before this litigation commenced. Nevertheless, even if LaSalle obtained its interest from BNC after the lawsuit was initiated and even though the corporate assignment from MERS to LaSalle did not take place until well after suit was commenced, we see no reason to deny LaSalle an equitable mortgage. Whether awarded to BNC, MERS, or LaSalle, an equitable mortgage was called for in this case given the circumstances. We conclude that reversal is unwarranted.

We affirm the imposition of an equitable mortgage, but reverse that portion of the judgment that includes within the mortgage $9,711 in closing costs. Accordingly, the equitable mortgage is hereby reduced by $9,711.

/s/ William B. Murphy
/s/ David H. Sawyer
/s/ William C. Whitbeck