STATE OF MICHIGAN

COURT OF APPEALS

HOMEOWNERS INVESTMENT COMPANY,

Plaintiff-Appellant,

v

IBRAHIM AL KASMIKHA and HAIFA AL KASMIKHA,

Defendants-Appellees.

UNPUBLISHED
August 4, 2009

No. 282981
Wayne Circuit Court
LC No. 07-726494-CK

Before: Saad, C.J., and Sawyer and Borrello, JJ.

PER CURIAM.

Plaintiff appeals the trial court's order that granted defendants' motion for summary disposition, denied plaintiff's motion for leave to amend its complaint, and declared a quitclaim deed executed by defendants in favor of plaintiff for a stated consideration of less than one dollar to be null and void and of no effect. For the reasons set forth below, we affirm.

I. Facts

This case arises out of plaintiff's efforts to collect a debt allegedly owed by defendants in connection with a promissory note that defendants executed in August 2005 in favor of Sunset Mortgage Company ("Sunset"). As security for the note, defendants executed a mortgage in favor of Sunset on property located in Macomb County (the "Macomb property"). Also in August 2005, defendants executed a separate quitclaim deed in favor of plaintiff for other property located on Seven Mile Road in Detroit (the "Seven Mile property"), for a recited consideration of less than one dollar. The quitclaim deed states that it was "given as security for mortgage to be given on this property." Plaintiff also seeks reimbursement for its undertaking between August 2006 and July 2007 to discharge a mortgage on the Seven Mile property, which secured a debt owed by defendants to Peoples State Bank. After defendants recorded an affidavit with the Wayne County Register of Deeds in August 2007 in which they declared the quitclaim deed for the Seven Mile property null and void, plaintiff filed this action and sought to foreclose on the Seven Mile property in satisfaction of defendants' alleged debt, and sought declaratory relief and money damages under several tort theories.

II. Analysis

A. Foreclosure Claim and Quitclaim Deed

Plaintiff argues that the trial court erred when it granted defendants' motion for summary disposition with respect to its foreclosure claim against the Seven Mile property and declared the quitclaim null and void. Plaintiff argues that it at least established a question of fact about whether the quitclaim deed created a mortgage that could be foreclosed to collect defendants' outstanding debt.[1]

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[1] We review a trial court's decision granting summary disposition de novo to determine if the moving party was entitled to judgment as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). While the trial court did not specify whether it was granting defendants' motion under MCR 2.116(C)(8) or (10), it stated in its order that it considered the documentary evidence that was submitted. Because the trial court looked beyond the pleadings, it is apparent that it granted defendants' motion under MCR 2.116(C)(10). *Healing Place at North Oakland Medical Ctr v Allstate Ins Co*, 277 Mich App 51, 55; 744 NW2d 174 (2007); *Driver v Hanley (After Remand)*, 226 Mich App 558, 562; 575 NW2d 31 (1997).

A motion under MCR 2.116(C)(10) tests the factual support for a claim. *Healing Place at North Oakland Medical Ctr, supra* at 55. A court must consider the pleadings, affidavits, admissions, and other documentary evidence submitted by the parties to the extent the evidence would be admissible, and view that evidence in a light most favorable to the nonmoving party. *Id.* at 56; MCR 2.116(G)(6). Summary disposition is appropriate if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Healing Place at North Oakland Medical Ctr, supra* at 56. "A genuine issue of material fact exists when the record, drawing all reasonable inferences in favor of the nonmoving party, leaves open an issue upon which reasonable minds could differ." *Id.*

To the extent that the parties' dispute involves the interpretation of a contract, or whether any ambiguity exists, these questions of law are also reviewed de novo. *Wilkie v Auto-Owners Ins Co*, 469 Mich 41, 47; 664 NW2d 776 (2003). A contract is ambiguous when two provisions irreconcilably conflict with each other or a term is equally susceptible to more than a single meaning. *Coates v Bastian Bros, Inc*, 276 Mich App 498, 503; 741 NW2d 539 (2007). Summary disposition is inappropriate if a contract is ambiguous because factual development is necessary to determine the parties' intent. *SSC Assoc Ltd Partnership v Gen Retirement Sys*, 192 Mich App 360, 363; 480 NW2d 275 (1991). A deed is a contract. *Negaunee Iron Co v Iron Cliffs Co*, 134 Mich 264, 279; 96 NW 468 (1903). The interpretation of a deed necessarily focuses on its plain language, but is guided by the following principles:

> (1) In construing a deed of conveyance[,] the first and fundamental inquiry must be the intent of the parties as expressed in the language thereof; (2) in arriving at the intent of parties as expressed in the instrument, consideration must be given to the whole [of the deed] and to each and every part of it; (3) no language in the instrument may be needlessly rejected as meaningless, but, if possible, all the language of a deed must be harmonized and construed so as to make all of it meaningful; (4) the only purpose of rules of construction of conveyances is to enable the court to reach the probable intent of the parties when

(continued…)

We begin our analysis by considering the nature of the debt that plaintiff seeks to collect through foreclosure of the Seven Mile property. To the extent that plaintiff argues that the debt is the unpaid balance on the August 12, 2005, promissory note for the principal of $75,000, the loan documents show that this debt was secured only by a mortgage on the Macomb property, which was then assigned to plaintiff by Sunset. A mortgage is "[a] conveyance of an interest in real estate to secure the performance of an obligation." *In re Van Duzer*, 390 Mich 571, 577; 213 NW2d 167 (1973). "[A]n assignee stands in the shoes of the assignor and acquires the same rights as the assignor possessed." *Professional Rehabilitation Assoc v State Farm Mut Automobile Ins Co*, 228 Mich App 167, 577 NW2d 909 (1998).

Although plaintiff's president, Isaiah Shafir, submitted an affidavit in which he provided a different view of the loan transaction, whereby he treated the August 12, 2005, quitclaim deed executed by defendants in favor of plaintiff for the Seven Mile Road as "security for the mortgage" and the primary collateral for the loan, conclusory averments in an affidavit do not establish disputed facts. *SSC Assoc Ltd Partnership v Gen Retirement Sys*, 192 Mich App 360, 364; 480 NW2d 275 (1991). The purpose of an affidavit is to help a court decide whether a factual issue exists. *Id*. An affidavit in support of or in opposition to a motion must be based on personal knowledge, and, "state with particularity facts admissible as evidence," and show that the affiant, if sworn as a witness, could testify competently to the facts stated in the affidavit. MCR 2.119(B)(1). A witness may not testify to a matter "unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter." MRE 602.

The conclusory averments in Shafir's affidavit are insufficient to counter the documentary evidence that plaintiff acquired an interest in the promissory note executed by defendants solely as an assignee of Sunset. Plaintiff did not set forth specific facts showing a genuine issue for trial relative to the nature of the debt or its assignee status. Thus, plaintiff's status is that of Sunset's assignee with respect to any foreclosure rights that accompany the $75,000 promissory note. *Maiden v Rozwood*, 461 Mich 109, 121; 597 NW2d 817 (1999); *Healing Place at North Oakland Medical Ctr v Allstate Ins Co*, 277 Mich App 51, 55; 744 NW2d 174 (2007).

Examined in this context, we reject plaintiff's argument that its acquisition of the January 5, 2007, "sheriff's deed on mortgage sale" for the Macomb property, for a stated price of $83,446.51 following the foreclosure sale, was ineffective to extinguish the balance owed on the $75,000 promissory note. The evidence does not support an inference that plaintiff acquired the sheriff's deed through anything but a full credit bid relative to that promissory note. Indeed, there is documentary evidence that the amount bid by defendants was computed using the principal sum of $80,861.96, which is more than the outstanding balance owed for the $75,000 promissory note.

"When a lender bids at a foreclosure sale, it is not required to pay cash, but rather is permitted to make a credit bid because any cash tendered would be returned to it." *New*

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it is not otherwise ascertainable. [*Dep't of Natural Resources v Carmody-Lahti Real Estate, Inc*, 472 Mich 359, 370; 699 NW2d 272 (2005).]

Freedom Mortgage Corp v Globe Mortgage Corp, 281 Mich App 63, 68; 761 NW2d 832 (2008). If the credit bid equals the unpaid principal and interest for the mortgage, plus foreclosure costs, it is considered a "full credit bid" and is deemed to have extinguished the mortgage. *Id*. The mortgage is extinguished at the time of the foreclosure sale. *Bank of Three Oaks v Lakefront Properties*, 178 Mich App 551, 555; 444 NW2d 217 (1989). The purchaser becomes vested with equitable title, subject to the mortgagor's right of redemption and any rights of a senior mortgagee. See MCL 600.3236; *Ruby & Assoc, PC v Shore Financial Services*, 276 Mich App 110, 118-119; 741 NW2d 72 (2007), vacated in part on other grounds 480 Mich 1107 (2008); *Bd of Trustees of the Gen Retirement Sys of Detroit v Ren-Cen Indoor Tennis & Racquet Club*, 145 Mich App 318, 322; 377 NW2d 432 (1985).

Plaintiff failed to show a genuine issue of material fact regarding whether the outstanding balance of the $75,000 loan secured by the mortgage on the Macomb property was extinguished by its acquisition of vested equitable title on January 5, 2007. The evidence that a senior mortgagee acquired its own equitable title to the property, following a foreclosure sale on January 19, 2007, did not preclude extinguishment of the mortgage debt. It is presumed that the price at the foreclosure sale on a junior mortgage is depressed to reflect the senior mortgage. *Bd of Trustees of the Gen Retirement System of Detroit*, *supra* at 324-325. Therefore, a party holding the rights of a junior mortgagee, such as plaintiff, must satisfy the debt secured by the senior mortgage in order to prevent the senior mortgagee from asserting a superior claim to the property. *Id.* at 326.

In sum, the extinguishment of a mortgage debt does not depend on whether the nature of the junior mortgagee's title was equitable in nature, or had changed to legal title because the mortgagee failed to exercise the right of redemption, before the senior mortgagee exercises its superior claim to the property. In either situation, the junior mortgagee takes title to the property subject to the senior mortgagee's rights. It follows that plaintiff's successful bid at its foreclosure sale for the Macomb property had the effect of extinguishing defendants' mortgage debt as a matter of law.

But even if the mortgage debt was not extinguished by plaintiff's acquisition of title, we would affirm the trial court's summary disposition decision because plaintiff failed to provide factual support for its position that it had a right to foreclose on the Seven Mile property to collect the balance owed on the $75,000 promissory note or any other sum that it sought to recover from defendants. In this regard, we find merit to plaintiff's argument that a deed absolute on its face may be declared an equitable mortgage. "The court of equity protects the necessitous by looking through form to the substance." *Koenig v Van Reken*, 89 Mich App 102, 106; 279 NW2d 590 (1979). The circumstances in which courts have declared a deed absolute on its face to be an equitable mortgage, notwithstanding the requirements of the statute of frauds for interests in land, MCL 566.106, is if one party stands in a relationship of trust or guidance to another party, or a creditor abuses its "power of coercion" over the debtor to obtain a deed. *Schultz v Schultz*, 117 Mich App 454, 459; 324 NW2d 48 (1982). Equity will decree an equitable mortgage under proper circumstances so as to permit the grantee to bring a foreclosure action if the obligation is not performed. *Feldman v M J Assoc*, 117 Mich App 770, 774; 324 NW2d 496 (1982). "In the absence of a written contract, an equitable lien will be established only where, through the relations of the parties, there is a clear intent to use an identifiable piece

of property as security for a debt." *Senters v Ottawa Savings Bank, FSB*, 443 Mich 45, 53; 503 NW2d 639 (1993).

Here, it is clear from the August 12, 2005, quitclaim deed's stated consideration of less than one dollar that it was not intended as an absolute conveyance. *Ellis v Wayne Real Estate Co*, 357 Mich 115; 97 NW2d 758 (1959). This intent is further supported by defendants' express statement in the deed that the "quit claim deed is given as security for mortgage to be given on this property." Reasonable minds could not differ in construing defendants' express statement as an indication that some future mortgage debt, or at least a preexisting debt,[2] was intended to be secured by the deed.

But for purposes of our review, we need not consider whether the statement was intended to address the $75,000 debt secured by the mortgage for the Macomb property, which plaintiff acquired a right to collect by assignment, or was intended to address the possibility of an additional loan of $75,000, as claimed by defendants. The material fact is that the deed plainly contemplates that defendants would take some type of affirmative action, other than merely executing the deed, to create a mortgage. Otherwise, the phrase "mortgage to be given" would be rendered nugatory. Courts strive to give effect to every word, phrase, and clause in a deed or contract. *Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 468; 663 NW2d 447 (2003); see also *Dep't of Natural Resources v Carmody-Lahti Real Estate, Inc*, 472 Mich 359, 370; 699 NW2d 272 (2005). A contractual condition can prevent the formation of the contract itself. *Modern Globe, Inc v 1425 Lake Drive Corp*, 340 Mich 663, 668; 66 NW2d 92 (1954). "The making and delivering of a writing, no matter how complete a contract according to its terms, is not a binding contract if delivered upon a condition precedent to its becoming obligatory." *White Showers, Inc v Fischer*, 278 Mich 32, 38; 270 NW 205 (1936), quoting *Cleveland Refining Co v Dunning*, 115 Mich 238, 239; 73 NW 239 (1897).

Examined as a whole, the quitclaim deed is unambiguous and, therefore, must be applied as written. *Coates v Bastian Bros, Inc*, 276 Mich App 498, 503; 741 NW2d 539 (2007). Considering the plain meaning of the phrase "given as security for mortgage to be given on this property" in the deed and the documentary evidence showing that defendants were able to obtain the $75,000 loan from Sunset solely on the basis of a mortgage for the Macomb property, reasonable minds could not differ in concluding that the quitclaim deed was ineffective to create an equitable mortgage with respect to the Seven Mile property to secure the $75,000 debt. The deed is properly viewed as containing a condition precedent to the formation of a contract, which was never satisfied because defendants gave no mortgage on the Seven Mile property to secure any future or preexisting debt. Therefore, plaintiff's foreclosure claim lacked the necessary factual support to avoid summary disposition under MCR 2.116(C)(10).

B. Tort Claims

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[2] A preexisting debt may constitute sufficient consideration to support a promissory note. See *Ann Arbor Constr Co v Glime Constr Co*, 369 Mich 669, 673-674; 120 NW2d 747 (1963).

Plaintiff challenges the trial court's grant of defendants' motion for summary disposition with respect to its conversion claim against defendants based on their failure to use proceeds from the $75,000 loan to discharge a mortgage on the Seven Mile property that was held by Peoples State Bank.[3]

We disagree with plaintiff's argument that defendants failed to provide evidentiary support for their motion. The documentary evidence submitted by defendants was sufficient to satisfy their initial burden under MCR 2.116(C)(10). See MCR 2.116(G)(3)(b); *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). We further hold that plaintiff failed to satisfy its burden of setting forth specific facts showing a genuine issue of material fact for trial. *Maiden, supra* at 121; *Healing Place at North Oakland Medical Ctr, supra* at 55.

Conversion is generally defined as "any distinct act of domain wrongfully exerted over another's personal property in denial of or inconsistent with the rights therein." *Foremost Ins Co v Allstate Ins Co*, 439 Mich 378, 391; 486 NW2d 600 (1992). "An action for conversion lies where an individual cashes a check and retains the full amount of the check when he is entitled to only a portion of that amount." *Citizens Ins Co v Delcamp Truck Ctr, Inc*, 178 Mich App 570, 576; 444 NW2d 210 (1989).

Here, plaintiff failed to present any admissible evidence that defendants, as part of their loan transaction with Sunset, had an obligation to use the $32,292.64 that they received as loan proceeds to pay the mortgage debt owed to Peoples State Bank. We reject plaintiff's argument that Shafir's affidavit was sufficient to create a genuine issue of material fact with respect to this issue. The affidavit is conclusory in nature and fails to demonstrate any ambiguity in the written loan agreement that requires further factual development. *SSC Assoc Ltd Partnership, supra* at 363-364.

Because plaintiff failed to present admissible evidence that defendants converted the loan proceeds, it is unnecessary to consider defendants' argument that it was also entitled to summary disposition because plaintiff suffered no damages. Nonetheless, we consider this issue because it is also relevant to plaintiff's fraudulent misrepresentation claim and defendants specifically sought summary disposition of this count and the tort claims based on plaintiff's lack of damages.

We note that, like the conversion claim, plaintiff's fraudulent misrepresentation claim is based on defendants' failure to use the loan proceeds to discharge the mortgage held by Peoples State Bank, except that plaintiff alleges that defendants promised to use the loan proceeds to discharge that mortgage, rather than committing an act of conversion. A promise made in bad faith and with no intention to perform it can form the basis for a fraud claim. *Derderian v Genesys Health Care Systems*, 263 Mich App 364, 378-379; 689 NW2d 145 (2004). A plaintiff

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[3] Again, while the trial court did not specify the subrule under which it dismissed this claim on summary disposition, because it considered the parties' documentary evidence, we review its decision under MCR 2.116(C)(10). *Healing Place at North Oakland Medical Ctr, supra* at 55; *Driver, supra* at 562.

must also prove its reliance on the representation and damages. *New Freedom Mortgage Corp, supra* at 69; *Derderian, supra* at 378.

Damages in a tort case generally consist of "all injuries resulting directly from [a] wrongful act, whether foreseeable or not, provided the damages are the legal and natural consequences of the wrongful act, and are such as, according to common experience and the usual course of events, might reasonably have been anticipated." *Sutter v Biggs*, 377 Mich 80, 86; 139 NW2d 684 (1965). If there are no damages, summary disposition is appropriate. *New Freedom Mortgage Corp, supra* at 69-70.

Considering the evidence that plaintiff received the value of the loan proceeds from the $75,000 promissory note, with interest and costs, following the January 5, 2007, foreclosure sale for the Macomb property, and the absence of any evidence that plaintiff had a duty to discharge the mortgage owed to Peoples State Bank, we hold that plaintiff failed to demonstrate a genuine issue of fact with respect to any damages arising from defendants' alleged conversion or bad-faith promise. Plaintiff's unsupported assertion on appeal that it is undisputed that plaintiff was required to pay the Peoples State Bank is insufficient to establish an issue of fact. MCR 7.212(C)(7) requires that facts stated in support of an appellant's argument be "supported by specific page references to the transcript, the pleadings, or other document or paper filed with the trial court." See also *Derderian, supra* at 388. Even were we to overlook this deficiency, we would not find any basis for disturbing the trial court's summary disposition decision because the documentary evidence, viewed in a light most favorable to plaintiff, establishes only that plaintiff entered into a voluntary agreement with Peoples State Bank in August 2006 to discharge the mortgage so as to preclude Peoples State Bank from taking foreclosure action against the Seven Mile property and that plaintiff continued making those payments until July 2007.

Because there is no admissible evidence to support an inference that plaintiff had any obligation to pay defendants' debt, other than its voluntary undertaking to do so beginning in August 2006, summary disposition was proper with respect to both the conversion and fraud claims based on the absence of damages. *New Freedom Mortgage Corp, supra* at 69-70. In light of our decision, it is unnecessary to address defendants' argument that the fraud claim could have also been dismissed because the circumstances constituting the alleged fraud were not pleaded with particularity or supported with admissible evidence.

Plaintiff's additional argument regarding its innocent misrepresentation claim is not properly before us because it is not set forth in the statement of questions presented, as required by MCR 7.212(C)(5). *Van Buren Twp v Garter Belt, Inc*, 258 Mich App 594, 632; 673 NW2d 111 (2003). In any event, the absence of fraudulent intent is not the only distinction between innocent misrepresentation and fraud. A claim of innocent misrepresentation cannot be based on a promise of future conduct. *Derderian, supra* at 381. Therefore, aside from plaintiff's failure to show a genuine issue of material fact with respect to damages, plaintiff has not substantiated its position that it properly pleaded a claim of innocent misrepresentation using the same alleged promise as the fraud claim.

C. Motion to Amend Complaint

Plaintiff maintains that it should have been permitted to amend its complaint to add claims for unjust enrichment and equitable subrogation.[4]

The equitable doctrine of unjust enrichment is based on the principle that a party should not be allowed to profit at another's expense. *McCreary v Shields*, 333 Mich 290, 294; 52 NW2d 853 (1952). The law will imply a contract to prevent the inequity arising from a defendant's receipt of a benefit from the plaintiff. *Sweet Air Investment, Inc v Kenney*, 275 Mich App 492, 504; 739 NW2d 656 (2007). But no contract will be implied if there is an express contract covering the subject matter. *Belle Isle Grill Corp v Detroit*, 256 Mich App 463, 478; 666 NW2d 271 (2003). "There cannot be an express and implied contract covering the same subject matter at the same time." *Campbell v Troy*, 42 Mich App 534, 537; 202 NW2d 547 (1972).

Here, plaintiff's proposed amended complaint alleged a claim for unjust enrichment based on the inequity of allowing defendants to use and enjoy the Seven Mile property, without making payments or providing compensation for such use and enjoyment, in the face of the quitclaim deed executed for that property. The trial court ruled that the proposed amendment would be futile. Having previously determined that the quitclaim deed was ineffective to convey any property interest in the Seven Mile property to plaintiff, it follows that the trial court did not abuse its discretion when it denied the motion to amend. *Ormsby v Capital Welding, Inc*, 471 Mich 45, 52-53; 684 NW2d 320 (2004).

Plaintiff's additional argument that it should have been allowed to amend its complaint to allege an unjust enrichment claim based on defendants' receipt of a benefit from plaintiff's payments of approximately $23,000 to Peoples State Bank is unpreserved for appeal because this claim was not set forth in plaintiff's written motion, nor did plaintiff's counsel request at the motion hearing that it be allowed to submit a proposed theory of unjust enrichment different from that set forth in the written proposal. MCR 2.118(A)(4) requires that proposed amendments be in writing. See also *Lown v JJ Eaton Place*, 235 Mich App 721, 726; 598 NW2d 633 (1999). And while this Court may overlook preservation requirements to prevent a miscarriage of justice, "parties have a duty to fully present their legal arguments to the court for its resolution of their dispute." *Walters v Nadell*, 481 Mich 377, 387-388; 751 NW2d 431 (2008). The general "raise or waive" rule in Michigan is intended to "require litigants to raise and frame their arguments at a time when their opponents may respond to them factually." *Id.* at 388. The rule also "avoids the untenable result of permitting an unsuccessful litigant to prevail by avoiding its tactical

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[4] We review a trial court's decision to deny a motion to amend for an abuse of discretion. *Ormsby v Capital Welding, Inc*, 471 Mich 45, 52-53; 684 NW2d 320 (2004). Under MCR 2.116(I))(5), if a trial court grants summary disposition under MCR 2.116(C)(10), it should freely grant a nonprevailing party an opportunity to amend the complaint pursuant to MCR 2.118, unless the amendment would not be justified. *Id.* "An abuse of discretion occurs when a trial court's decision "results in an outcome falling outside the principled range of outcomes." *Woodard v Custer*, 476 Mich 545, 557; 719 NW2d 842 (2006).

decisions that proved unsuccessful." *Id.* Having reviewed the record, including the specific arguments presented by plaintiff's counsel to the trial court at the motion hearing, we hold that consideration of plaintiff's unpreserved proposed amendment is not warranted.

Plaintiff's request that it should be allowed to amend its complaint to allege a claim of equitable subrogation is also unpreserved to the extent that it was not included in plaintiff's proposed amended complaint. At best, plaintiff's counsel orally characterized plaintiff's theory at the motion hearing, for purposes of opposing defendants' motion for summary disposition, as being based on equitable subrogation because defendants allegedly knew that they owed the money and that plaintiff was supposed to have a first mortgage on the Seven Mile property.

A court is not bound by a parties' choice of labels for an action because this would place form over substance. *Johnston v City of Livonia*, 177 Mich App 200, 208; 441 NW2d 41 (1989). Equitable subrogation is a mere legal fiction "through which a person who pays a debt for which another is primarily responsible is substituted or subrogated to all the rights and remedies of the other." *Hartford Accident & Indemnity Co v Used Car Factory, Inc*, 461 Mich 210, 215; 600 NW2d 630 (1999). "In order to be entitled to subrogation, a subrogee cannot voluntarily have made payment, but rather must have done so in order to fulfill a legal or equitable duty owed to the subrogor." *Ameriquest Mortgage Co v Alton*, 273 Mich App 84, 95; 731 NW2d 99 (2006).

Here, the evidence submitted to the trial court, viewed in a light most favorable to plaintiff, shows that plaintiff was a mere volunteer because it acquired no interest in the Seven Mile property and owed no duty, legal or equitable, to pay the debt owed by defendants to Peoples State Bank. *Id.* at 95-96. Thus, there is no merit to plaintiff's claim that it should have been allowed to advance counsel's argument regarding equitable subrogation in an amended complaint. Substantively, counsel's theory of equitable subrogation fails as a matter of law for the same reasons underlying the tort and foreclosure counts in the original complaint.

Affirmed.

/s/ Henry William Saad
/s/ David H. Sawyer
/s/ Stephen L. Borrello