

STATE OF MICHIGAN
COURT OF APPEALS

OAKWOOD PARK ASSOCIATION,

Plaintiff-Appellant,

v

TRACEY CATHEY, CAPITAL ALLIANCE
FINANCIAL, LLC, TROY CAPITAL, LLC, and
CCS HILCO CONVERSION,

Defendants,

and

OPTION ONE MORTGAGE CORPORATION

Defendant-Appellee.

UNPUBLISHED
December 9, 2010

No. 293458
Oakland Circuit Court
LC No. 08-093850-CH

Before: OWENS, P.J., and WHITBECK and FORT HOOD, JJ.

PER CURIAM.

In this mortgage priority case, plaintiff appeals as of right from the trial court's denial of its motion for summary disposition under MCR 2.116(C)(10) and grant of defendant's motion for summary disposition under MCR 2.116(C)(10) and (C)(8). The circuit court also denied plaintiff's motion for reconsideration. We affirm.

I. FACTS

This controversy involves the relative priority of defendant Option One Mortgage Corporation's ("Option One's") first mortgage on a condominium and a lien for common charges filed by plaintiff Oakwood Park Association, a condominium association. The parties dispute whether Option One's mortgage, recorded in 2003, or plaintiff's condominium assessment lien, recorded in 2007 and amended in 2008, is first in priority. The following facts are undisputed:

11/06/1997 Mortgage between Standard Federal and Prior Owner Recorded

09/10/2003 Mortgage between Standard Federal and Prior Owner Discharged.

10/09/2003 Mortgage between Option One and Current Owner Recorded

02/28/2007 Plaintiff's Lien Recorded

04/11/2008 Plaintiff's Amended Lien Recorded

11/26/2008 Discharge of Mortgage between Standard Federal and Prior Owner
Recorded.

II. STANDARD OF REVIEW

A trial court's decision on a motion for summary disposition is reviewed de novo. *Lind v City of Battle Creek*, 470 Mich 230, 238; 681 NW2d 334 (2004). Likewise, statutory interpretation is an issue of law that is reviewed de novo on appeal. *Toll Northville Ltd v Northville Twp*, 480 Mich 6, 10-11; 743 NW2d 902 (2008).

III. FIRST MORTGAGE OF RECORD

Plaintiff argues that the trial court erred in granting defendant's motion for summary disposition and in denying plaintiff's motion for summary disposition. We disagree.

The parties' dispute centers on the meaning of the term "first mortgage of record" as used in section 108 of the Condominium Act, MCL 559.101 *et seq.* (the "Act"). Section 108 of the Act provides, in relevant part:

(1) Sums assessed to a co-owner by the association of co-owners that are unpaid together with interest on such sums, collection and late charges, advances made by the association of co-owners for taxes or other liens to protect its lien, attorney fees, and fines in accordance with the condominium documents, constitute a lien upon the unit or units in the project owned by the co-owner at the time of the assessment before other liens except tax liens on the condominium unit in favor of any state or federal taxing authority and sums unpaid on a first mortgage of record, except that past due assessments that are evidenced by a notice of a lien recorded as set forth in subsection (3) have priority over a first mortgage recorded subsequent to the recording of the notice of lien. [MCL 559.208].

The parties agree that Section 208(1) provides condominium assessment liens with "super-priority status." However, the parties dispute the circumstances in which such super-priority status applies. Option One argues that it does not permit plaintiff's condominium assessment lien, indisputably recorded after Option One's mortgage, to have priority over Option One's mortgage. Plaintiff argues that Option One's is not a first mortgage of record because the failure to *record the discharge* of the prior Standard Federal mortgage until 2008 renders the Option One mortgage less than a "first mortgage of record." Plaintiff argues that the phrase "of record" means that the mortgage recorded first in a chain of title remains the first mortgage of record until a discharge of that mortgage is recorded, regardless of whether the mortgage recorded first is extinguished, and regardless of any other mortgages recorded subsequently but before condominium assessments are incurred and a related lien is recorded.

We reject plaintiff's argument. Although the Standard Federal mortgage was "of record" at the time of plaintiff's lien(s) and filing of the complaint, as a matter of law, the Standard Federal mortgage was a nullity. Because the debt was extinguished by the time plaintiff recorded its liens and filed its complaint, the mortgage had no legal effect as an encumbrance on the land. Accordingly, the Standard Federal mortgage could not have been the first mortgage of record, as it ceased to exist in 2003.

Even if this were not the case, MCL 559.208(1) provides that a condominium assessment lien does not have priority over "sums unpaid on a first mortgage of record." The term "sums unpaid" cannot be ignored and is consistent with well settled Michigan jurisprudence recognizing that payment is significant in that "payment, release, or anything which extinguishes the debt, *ipso facto* extinguishes the mortgage." *Ladue v The Detroit & Milwaukee Railroad Co*, 13 Mich 380, 397 (1865). The inclusion of the phrase "sums unpaid" in Section 208(1) is consistent with the jurisprudence that a first mortgage of record, having been paid in full, would not have priority over a condominium assessment lien, regardless of whether it was discharged as it is paid in full with no "sums unpaid." Indeed, the phrase "sums unpaid" in Section 208(1) is included to address situations like those presented here, i.e., the first mortgage recorded, although paid in full and discharged, but which discharge has not been recorded, cannot be a present first mortgage because it ceased to exist and there are no "sums unpaid"; as such, the unpaid portion of a recorded first priority mortgage senior to the assessment lien falls within the ambit of the statutory priority accorded to "sums unpaid on a first mortgage of record."

In short, Standard Federal's mortgage was no longer in existence, having been discharged when the note secured by it was paid in full. While it was still "of record" due to the failure to record a discharge, it was a nullity. Thus, Option One's mortgage was the first mortgage of record. Even if Standard Federal's mortgage were considered to be in existence due to the failure to record the discharge, Option One's mortgage still would have priority under MCL 559.208(1). Option One's mortgage was the only "first mortgage of record" with "sums unpaid" as the law requires for priority. Standard Federal's mortgage had no "sums unpaid" so it could not qualify for priority. Thus, the trial court did not err in granting Option One's motion for summary disposition, and in denying plaintiff's motion for summary disposition.

Affirmed.

/s/ Donald S. Owens
/s/ William C. Whitbeck
/s/ Karen M. Fort Hood