STATE OF MICHIGAN

COURT OF APPEALS

CHRISTINE L. KNOLL, Plaintiff/Counter-Defendant-Appellee,	UNPUBLISHED March 1, 2011
v	Nos. 295596; 296028 Van Buren Circuit Court
CHEMICAL BANK, f/k/a CHEMICAL BANK SHORELINE, Defendant/Counter-Plaintiff-Appellant,	LC No. 08-570971-NZ
and EVAN W. KNOLL, Defendant.	

Before: OWENS, P.J., and MARKEY and METER, JJ.

PER CURIAM.

Defendant Chemical Bank appeals by right the trial court's order granting summary disposition in favor of plaintiff Christine L. Knoll. Defendant also appeals by right the trial court order's awarding plaintiff costs and attorney fees. We affirm.

This lawsuit is based on a dispute between plaintiff and defendant regarding the scope of a mortgage. Plaintiff and Evan Knoll, formerly married and currently divorced, signed two mortgages with defendant, one in September 2004 and one in December 2004. The September 2004 mortgage was a future advance mortgage, securing the payment of loans and advances and "all other existing and future obligations of mortgagor to the bank" with four specific pieces of property. The December 2004 mortgage secured the "indebtedness" of the "mortgagor" with the former marital home, hereinafter referred to as the residential property. Additionally, Evan, as the representative of General Sales and Services, Inc., subsequently entered into other various obligations with defendant. Defendant granted Evan and General Sales and Services, Inc. a commercial revolving note issued October 15, 2007, for $15,000,000 and a commercial term note issued June 29, 2005, for $568,000. Both notes were signed by Evan and list the company

as the obligor. On November 20, 2008, defendant foreclosed both mortgages after the company defaulted on the two commercial notes.[1]

The issue resolved by the trial court's grant of summary disposition was whether the December 2004 mortgage secured by the residential property was also meant to secure the debt on which Evan and the company defaulted. The trial court found that the mortgage plaintiff signed pledging her personal residence as security in December of 2004 was limited to the debts of the "mortgagor," which the mortgage contract defined as plaintiff and Evan's joint debt only. Defendant's position was that both mortgages secure all the debt of either plaintiff, Evan, or the company jointly or individually. Defendant argues on appeal that it was entitled to foreclose on the residential property pursuant to the December mortgage following Evan's and the company's default on their payments. Alternatively, defendant argues that even if the December mortgage did not secure the defaulted debt, an equitable mortgage as to the defaulted debt should be imposed permitting defendant to foreclose on the residential property.

This Court reviews a trial court's decision to grant summary disposition de novo. *Coblentz v City of Novi*, 475 Mich 558, 567; 719 NW2d 73 (2006). The evidence is viewed in the light most favorable to the nonmoving party. *Id.* at 567-568. "Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law." *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). "The trial court's findings of fact are reviewed for clear error, MCR 2.613(C), but the court may not resolve factual disputes or determine credibility in ruling on a summary disposition motion . . . ." *Burkhardt v Bailey*, 260 Mich App 636, 646-647; 680 NW2d 453 (2004).

When interpreting a contract, such as a mortgage, the goal is to ascertain and enforce the parties' intent according to the plain language of the contract. *New Freedom Mtg Corp v Globe Mtg Corp*, 281 Mich App 63, 76; 761 NW2d 832 (2008). "Clear, unambiguous, and definite contract language must be enforced as written and courts may not write a different contract for the parties or consider extrinsic evidence to determine the parties' intent." *Wausau Underwriters Ins Co v Ajax Paving Indus, Inc*, 256 Mich App 646, 650; 671 NW2d 539 (2003). Thus, contracts that are clear and unambiguous are construed as a matter of law. *Id.* Contracts must be construed to give effect to every word or phrase whenever practicable. *Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 467; 663 NW2d 447 (2003). The Court must not read words into a contract that are not there. *Terrien v Zwit*, 467 Mich 56, 75; 648 NW2d 602 (2002). If two provisions in a contract irreconcilably conflict, summary disposition is improper because the contract's meaning is a question of fact. *Klapp*, 468 Mich 469, 480.

Defendant first argues the December 2004 mortgage may be foreclosed upon based on the default because the December 2004 mortgage secures the "indebtedness" of the "mortgagor," and the commercial notes represent "indebtedness" by Evan, who is the "mortgagor." Defendant

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[1] Evan is the president of a General Sales and Services, Inc. Plaintiff has worked at the company since 1989. Plaintiff and Evan's October 10, 2000, judgment of divorce required Evan to continue plaintiff's employment at General Sales and Services for 120 months.

argues that "mortgagor" should be construed to mean the debt of plaintiff and Evan, either jointly, severally, or individually.

The term "mortgagor" is specifically defined in the mortgage contract and provides: "This mortgage is made as of the 15th day of December, 2004, by and between Evan W. Knoll, a single man, and Christine L. Knoll . . . (the "Mortgagor")." This provision is not reasonably susceptible to two possible meanings, so it is unambiguous. The section defines "mortgagor," and this definition clearly expresses the parties' intent that the mortgagor be defined as plaintiff and Evan together. In light of the definition of the "mortgagor" and in the absence of any language or provision suggesting that plaintiff and Evan are liable jointly, severally, and individually, the unambiguous meaning of "indebtedness" in the December mortgage is Evan and plaintiff's joint debt. Thus, because the mortgage unambiguously secures only the joint debt of plaintiff and Evan and it was Evan and the company that defaulted on two commercial notes that plaintiff neither signed nor was involved in, the trial court's decision that defendant cannot foreclose on the property is correct and should be affirmed.

Defendant offers an alternative argument that even if the December mortgage secures only joint debt, it properly foreclosed because the commercial notes that were defaulted upon constitute joint debt. Defendant specifically argues that a joint debt exists obligating plaintiff and defendant under the December mortgage because the September mortgage's indemnity section requires plaintiff and Evan to indemnify defendant for any liability, whether it be joint, several or individual. Defendant argues that liability is defined as any existing or future debt, and thus the default on the commercial notes is a future debt (now existing) for which plaintiff and defendant are jointly required to indemnify defendant and, as such, constitutes a joint "indebtedness" secured by possession and the residential property pursuant to the December mortgage. We disagree. Defendant ignores the plain language of the mortgage contract, and its interpretation requires one to read meaning into the mortgage contracts that the parties did not express. *Terrien*, 467 Mich at 75. The Liabilities section of the September mortgage sets forth the obligations secured by the mortgage. The Indemnity section in the September mortgage plainly references actions by third parties and not the obligations secured by the mortgage or how plaintiff and Evan were to repay their debts to defendant.

Defendant further argues that the mortgage was granted by plaintiff and Evan as tenants in common because plaintiff and Evan owned the residential property as tenants in common; consequently, defendant was at least entitled to foreclose on Evan's interest in the residential property. Defendant cites MCL 552.102 as authority for its position. MCL 552.102 provides: "Every husband and wife owning real estate as joint tenants or as tenants by entireties shall, upon being divorced, become tenants in common of such real estate, *unless the ownership thereof is otherwise determined by the decree of divorce*" (emphasis added). The divorce judgment between plaintiff and Evan plainly specifies that plaintiff has exclusive possession of the property. It further states that ten years after the entry of the divorce judgment, Evan must pay off the mortgage and surrender any interest or title to the property. Thus, consistent with MCL 552.102, the decree of divorce determines a specific type of ownership regarding the former marital property.

Evan's ownership interest in the residential property at issue does not give defendant a right to foreclose on the property in response to Evan's individual default. Evan does not have

an interest in the property that he can lawfully encumber without plaintiff's consent because the judgment of divorce grants plaintiff exclusive title in the property. See *Brown v Phillips*, 40 Mich 264, 270-271 (1879) (holding mortgage does not attach to any interest other than that which mortgagor possessed when he gave the mortgage).

Defendant also argues that this Court should grant it an equitable mortgage or recognize that defendant has a right to equitable subrogation. An equitable mortgage is proper when "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). "'Equity 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.'" *Id.* at 54, quoting *Cheff v Haan*, 269 Mich 593, 598, 257 NW 894 (1934). The party asserting the existence of an equitable mortgage must establish the parties' intent to create a mortgage by "clear and satisfactory proof." *Judd v Carnegie*, 324 Mich 583, 587; 37 NW2d 558 (1949).

The facts of this case do not warrant creating an equitable mortgage. Plaintiff and defendant entered into an actual mortgage agreement and pledged property as security for a specific debt. The fact that defendant now wishes the property were explicitly pledged for another specific defaulted debt does not warrant the imposition of an equitable mortgage. Equitable mortgages are not properly imposed in order to save a party from its own legal mistake. *Burkhardt*, 260 Mich App at 659 (finding trial court erred when it granted an equitable mortgage because the parties did not intend to create a mortgage, and equity should not save a party from its own legal mistake). Defendant has not provided any evidence to support its claim that the absence of any language specifically securing the business debt with the residential property was the result of a mutual mistake. Moreover, plaintiff has specifically alleged that such an agreement was not her intent. Indeed, her belief and intent was that her residence secured only the December 2004 mortgage. Even construing the evidence in a light most favorable to the non-moving party, we find that defendant is not entitled to an equitable mortgage.

Defendant alternatively argues that it is entitled to equitable subrogation because pursuant to the December mortgage, defendant paid plaintiff's debt to Standard Federal Bank by lending money which was used to discharge the mortgage Standard Federal held and which was secured by the residential property. This argument makes no sense. The December 2004 loan was nothing more than a typical re-financing: the first mortgage holder's loan was repaid, and defendant and plaintiff entered into a new mortgage. "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). In this case defendant was not under a legal or equitable duty to enter the contracts at issue here; it was acting as a "mere volunteer" not entitled to invoke the doctrine of equitable subrogation. *Id*. at 95-98. "[T]he doctrine of equitable subrogation was never intended for the protection of sophisticated financial institutions that can choose the terms of their credit agreements." *Deutsche Bank Trust Co Americas v Spot Realty, Inc*, 269 Mich App 607, 614; 714 NW2d 409 (2005). Defendant is not entitled to equitable subrogation.

Defendant also challenges the trial court's order awarding plaintiff attorney fees and costs pursuant to MCR 2.405(D). MCR 2.405(D)(1) provides: "If the adjusted verdict is more

favorable to the offeror than the average offer, the offeree must pay to the offeror the offeror's actual costs incurred in the prosecution or defense of the action." Payment of actual costs incurred as determined by the trial court is mandatory, but the trial court may refuse to award attorney fees in the "interest of justice." MCR 2.405(D)(3); *Luidens v 63rd Dist Court*, 219 Mich App 24, 30-31; 555 NW2d 709 (1996). Defendant argues that the trial court should have applied the "interest of justice" exception and denied plaintiff's motion for attorney fees. Courts must not apply the interest of justice exception so broadly that it effectively nullifies the general rule which is intended to encourage settlement and to deter protracted litigation. *Stitt v Holland Abundant Life Fellowship (On Remand)*, 243 Mich App 461, 472; 624 NW2d 427 (2000). The general rule is that attorney fees will be granted and the interest of justice exception applies only when there are "unusual circumstances" justifying the denial of attorney fees. *Luidens*, 219 Mich App at 32-33.

This Court has provided examples of circumstances that would not be considered "unusual" enough to trigger the interest of justice exception. In *Derderian v Genesys Health Care Sys*, 263 Mich App 364, 391; 689 NW2d 145 (2004), the Court stated that "[f]actors such as the reasonableness of the offeree's refusal of the offer, the party's ability to pay, and the fact that the claim was not frivolous 'are too common' to constitute the unusual circumstances encompassed by the 'interest of justice' exception." *Id.* The facts of this case do not rise to the level of an unusual circumstance triggering the interest of justice exception. This Court has also noted that "few situations will justify denying an award of costs under MCR 2.405 in the 'interest of justice.'" *Hamilton v Becker Orthopedic Appliance Co*, 214 Mich App 593, 596; 543 NW2d 60 (1995)(citations omitted). The *Hamilton* Court held that the fact that the parties did not appear to have engaged in serious settlement negotiation did not constitute a circumstance giving rise to the interest of justice exception to the award of attorney fees. *Id.* at 597. Even if plaintiff's offer to settle did not represent an entirely serious attempt at settlement, attorney fees may still be awarded. Based on the record in this case, we find no unusual circumstances to trigger the interest of justice exception. Consequently, we conclude that the trial court's decision was not an abuse of discretion. *Stitt*, 243 Mich App at 472.

We affirm. As the prevailing party, plaintiff may tax costs pursuant to MCR 7.219.

/s/ Donald S. Owens
/s/ Jane E. Markey
/s/ Patrick M. Meter