

STATE OF MICHIGAN
COURT OF APPEALS

AGEMA, L.L.C.,

Plaintiff-Appellee,

v

GREENSTONE FARM CREDIT SERVICES,
F.L.C.A.,

Defendant-Appellant,

and

DANIEL NELSON and MARY KAY NELSON,

Defendants/Cross Plaintiffs/Third-
Party Plaintiffs,

and

GEORGETOWN REAL ESTATE
DEVELOPMENT, L.L.C., CARLOS O. RUSO, II,
ERIKA J. RUSO, DANIEL A. VAN
SUILICHEM, and JOY L. VAN SUILICHEM,

Defendants/Cross-Defendants,

and

LEO VESPI and IMPACT PROPERTY
PARTNERS, L.L.C.,

Third-Party Defendants.

Before: FITZGERALD, P.J., and METER and M. J. KELLY, JJ.

PER CURIAM.

UNPUBLISHED
May 14, 2013

No. 309984
Ottawa Circuit Court
LC No. 10-001765-CK

In this action concerning a priority dispute between two lenders, defendant GreenStone Farm Credit Services, F.L.C.A., appeals as of right the trial court's judgment declaring that plaintiff Agema, L.L.C., had a first-priority mortgage encumbering certain real property in Allendale, Michigan. We affirm.

David Agema is the manager and only member of plaintiff. On September 26, 2006, plaintiff lent \$100,000 to defendant/cross-defendant Georgetown Real Estate Development, L.L.C., at the behest of defendants/cross-defendants Carlos O. Ruso, II, and Daniel A. Van Sullichem, the managing members of Georgetown.¹ That same day, Georgetown executed a mortgage in favor of plaintiff on real property located at 4724 Arjana Rose Lane in Allendale, Michigan. The mortgage was subsequently recorded.

Shortly thereafter, Georgetown became delinquent in its payments to plaintiff. In April 2007, Georgetown, Ruso, and Van Sullichem approached David Agema about restructuring the loan and mortgage. In the proposed restructuring, plaintiff would receive one year's interest in a lump-sum amount, the original debt would be restructured, and Georgetown would add defendants/cross-plaintiffs/third-party plaintiffs Daniel Nelson and Mary Kay Nelson to the note and mortgage as additional security for the debt. David Agema indicated that he believed that the 2006 mortgage was to be refinanced and that the mortgage would retain its position of first priority after the transaction. On April 17, 2007, plaintiff entered into a promissory note whereby Georgetown, Ruso and his wife Erika J. Ruso, Van Sullichem and his wife Joy L. Van Sullichem, and the Nelsons agreed to pay plaintiff \$90,000, plus any further interest. The same parties entered into a mortgage agreement to secure the note on that same day. This 2007 mortgage was not recorded.

Unbeknownst to plaintiff, on April 17, 2007, Georgetown sold the property to the Nelsons. In order to facilitate the Nelsons' purchase of the property, third-party defendant Leo Vespi arranged for the Nelsons to borrow \$249,900 from GreenStone. Mary Kay Nelson indicated that the Nelsons believed that they were using their credit rating to act as straw purchasers for Vespi and Impact Property Partners, L.L.C., to purchase the property; she stated that she did "not really" believe that she and her husband were actually borrowing money. They also apparently did not know about their liability on the 2007 Agema mortgage.²

GreenStone indicated that it believed that the 2006 Agema mortgage on the property would be satisfied and extinguished with money Georgetown received from the Nelsons' purchase of the property; it relied upon a letter from David Agema wherein he specified a payoff

¹ A default was entered against Georgetown on June 15, 2010, and Georgetown did not participate in these proceedings. Ruso and Van Sullichem filed for bankruptcy during these proceedings, and they and their wives were dismissed from the action.

² Mary Kay Nelson testified that she signed a number of papers put in front of her and thought she was simply "lending" the good credit rating of her and her husband in exchange for a fee; she stated that she had never even heard of plaintiff until she was served in the present lawsuit. Daniel Nelson testified that he "agree[d] with everything" his wife had said.

amount for the 2006 mortgage, as well as a letter signed by David Agema directing Sun Title Agency (the agency that performed the closing of the Nelsons' purchase) to disburse the payoff amount. The letter directed that \$90,000 of the \$103,033.34 payoff amount was to be given to Georgetown and that \$13,033.34 was to be given to plaintiff. David Agema testified that he signed this letter, but did not read its contents. GreenStone entered into a promissory note and mortgage with the Nelsons and recorded the mortgage. GreenStone believed that its mortgage had first priority and that there were no existing mortgages on the property. GreenStone argued to the trial court that a settlement statement indicated that the 2006 Agema mortgage was satisfied with funds from the Nelsons' purchase of the property.

On March 19, 2010, plaintiff filed a complaint against Georgetown, the Nelsons, the Rusos, and the Van Suilichems because it had not received any mortgage payments. Plaintiff sought to foreclose on the property, and after discovering the 2007 GreenStone mortgage, argued that the 2006 mortgage had not been satisfied and that it retained its position of first priority over the GreenStone mortgage. GreenStone answered, arguing that the 2006 mortgage had been satisfied with proceeds from the Nelsons' purchase of the property and that the 2007 GreenStone mortgage had priority over the mortgage entered into by plaintiff, Georgetown, the Rusos, the Van Suilichems, and the Nelsons in 2007. After a bench trial, the trial court ruled in favor of plaintiff, finding that plaintiff did not intend for the 2006 mortgage to be satisfied by way of the 2007 agreement. It also found that payment on the 2006 note and mortgage was not tendered to plaintiff and that the 2006 note and mortgage remained on the property and had first priority over the subsequently-recorded GreenStone mortgage. "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). For the reasons set forth herein, we affirm the trial court's decision.

GreenStone contends that the 2006 Agema mortgage was satisfied and that plaintiff had a duty to discharge the mortgage. MCL 565.41(1) provides that a mortgagee has an obligation to discharge a mortgage if it has been "paid or otherwise satisfied" If a mortgage is paid or otherwise satisfied, the debt and mortgage are extinguished. See *Ginsberg v Capitol City Wrecking Co*, 300 Mich 712, 717; 2 NW2d 892 (1942), discussing *Ladue v Detroit & Milwaukee RR Co*, 13 Mich 380 (1865). "Michigan is a race-notice state, and owners of interests in land can protect their interests by properly recording those interests." *Richards v Tibaldi*, 272 Mich App 522, 539; 726 NW2d 770 (2006) (internal citations and quotation marks omitted). "Under MCL 565.29, the holder of a real estate interest who first records his or her interest generally has priority over subsequent purchasers." *Id.* In the case at bar, the 2006 Agema mortgage on the property was recorded before the 2007 GreenStone mortgage on the property. Thus, this 2006 mortgage, if not paid or otherwise satisfied, would have priority over the subsequently-recorded GreenStone mortgage. Conversely, if the 2006 Agema mortgage was paid or "otherwise satisfied," the 2007 GreenStone mortgage would have priority over the 2007 Agema mortgage, because GreenStone recorded its mortgage first.

"Michigan case law has held that acceptance of a renewal note is not regarded as payment of a preexisting note or obligation, in the absence of a novation or express agreement to the contrary." *Thorp Fin Corp of Wisc v Ken Hodgins & Sons*, 73 Mich App 428, 431; 251 NW2d 614 (1977), citing *Auch v Washtenaw Co Sheriff*, 289 Mich 206, 210; 286 NW 214 (1939), and *Haggerty v MacGregor*, 9 Mich App 671, 674; 158 NW 33 (1968). In *Thorp*, 73

Mich App at 431, this Court examined the intent of the parties in determining whether a subsequent note constituted a renewal or payment of the original note, stating, “A renewal note does constitute payment of the original obligation where such was the intent of the parties and such intention may be proved by circumstances such as acts or conduct by the parties, as well as by direct evidence of an express promise or agreement.”

We find that the trial court did not clearly err when it found that the 2007 transaction entered into by plaintiff, Georgetown, and the Rusos, Van Suilichems, and Nelsons was not intended to satisfy the 2006 Agema note and mortgage. Accordingly, as a matter of law, the 2006 note and mortgage were renewed and not extinguished. See *Thorp*, 73 Mich App at 431 (holding, as noted, that “Michigan case law has held that acceptance of a renewal note is not regarded as payment of a preexisting note or obligation, in the absence of a novation or express agreement to the contrary”), and *Guardian Depositors Corp v Currie*, 292 Mich 549, 560; 291 NW 2 (1940) (stating that “[i]t is a general rule that the renewal of a note is not payment of the obligation”). The trial court’s factual finding was not clearly erroneous because of David Agema’s testimony and because the 2006 note and mortgage both anticipated a future renewal. For instance, the 2006 note provides that “[t]he parties agree that nothing in this note shall be construed to affect the lien of the mortgage *or any other document now or later given as security for the payment of the debt on this note . . .*” (emphasis added). Additionally, the 2006 mortgage provides that “[t]he mortgagor shall pay the principal and interest of the mortgage debt according to the provisions of the mortgage and perform all its obligations under (a) *the note or any other promissory notes later issued for the mortgage debt*, (b) this mortgage, and (c) any other loan documents” (emphasis added). Moreover, David Agema presented un rebutted testimony that the 2007 transaction was a refinancing or, in his words, a “rollover” of the 2006 transaction. Evidence shows an intention for the 2007 transaction to renew, not satisfy, the 2006 note. Thus, the 2006 note and mortgage were not satisfied. See *Thorp*, 73 Mich App at 431-432, and *Guardian Depositors Corp*, 292 Mich at 560. Accordingly, the 2006 Agema mortgage remains and has priority over the 2007 GreenStone mortgage because it was first recorded. See MCL 565.29 and *Richards*, 272 Mich App at 539. We affirm the trial court’s judgment.

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ Patrick M. Meter
/s/ Michael J. Kelly