

**COURT OF APPEALS
DECISION
DATED AND FILED**

November 3, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

No. 98-3620

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

THE EQUITABLE BANK, S.S.B.,

PLAINTIFF-RESPONDENT,

v.

JAMES C. McDONALD AND RITA T. McDONALD,

DEFENDANTS-APPELLANTS,

**CHARLES CHABRON, A/K/A CHARLES K. CHABRON,
AND EVA CHABRON, A/K/A EVA I. CHABRON,**

DEFENDANTS-RESPONDENTS,

**STILLBROOK HOLLOW CONDOMINIUM OWNERS
ASSOCIATION, INC.,**

DEFENDANT.

APPEAL from a judgment of the circuit court for Waukesha County:
JAMES R. KIEFFER, Judge. *Affirmed.*

Before Brown, P.J., Anderson and Snyder, JJ.

¶1 PER CURIAM. James and Rita McDonald appeal from a foreclosure judgment giving the Equitable Bank, S.S.B., a priority interest over the McDonalds in the condominium project developed by Charles and Eva Chabron. The McDonalds argue that summary judgment was improper because a material issue of fact exists as to Equitable's knowledge of the McDonalds' prior lien or ownership interest. They also claim that the Chabrons had no interest that could be mortgaged to Equitable and that Equitable was not a good-faith transferee. We affirm the judgment because Equitable has priority by recording its mortgage prior to any recorded interest of the McDonalds.

¶2 On March 28, 1995, the McDonalds entered into an offer to purchase unit five of the Still Brook Hollow Condominium project. The Chabrons were developing the project, and unit five was not yet completed. The McDonalds agreed to pay \$345,000 and advanced \$225,000 toward purchase of the unit during construction. On January 30, 1996, the McDonalds cancelled the purchase agreement and requested that their \$225,000 be returned. The Chabrons refused to refund the money and the McDonalds commenced a lawsuit to recover the sum paid.

¶3 On May 3, 1996, Equitable Bank recorded its mortgage on units one through five of the Still Brook Hollow Condominium project. On May 10, 1996, the McDonalds recorded an affidavit of interest with respect to unit five based on their claim for return of their purchase money.

¶4 During discovery in their lawsuit against the Chabrons, the McDonalds found out that their purchase money had been diverted to the construction costs of unit four of the project. On the ground that the diversion of

funds constituted theft by contractor under § 779.02(5), STATS., the McDonalds sought to establish an interest in unit four of the project. On June 3, 1997, the McDonalds recorded an affidavit of interest in units one through five of the project. In the McDonalds' suit against the Chabrons, an order was entered on May 11, 1998, declaring that the "McDonalds do and did have an interest in the property known as Units 1, 2, 3, 4, and 5 of the condominium known as Still Brook Hollow Condominiums, that said interest is an interest superior to any interest of the Chabrons, that said interest was created and exists both in law and equity and by operation of Wisconsin Statutes Section 779.02(5)5 [sic]."

¶5 On May 26, 1998, Equitable filed this foreclosure action against the Chabrons and Still Brook Hollow Condominiums. The McDonalds asserted by affirmative defense and counterclaim against Equitable that their lien interest was superior to Equitable's interest. Equitable was granted summary judgment on the McDonalds' counterclaim, and an order was entered declaring the interest and/or lien of the McDonalds' to be subordinate and inferior to Equitable's interest and lien.

¶6 We review decisions on summary judgment de novo, applying the same methodology as the trial court. *See M & I First Nat'l Bank v. Episcopal Homes Management, Inc.*, 195 Wis.2d 485, 496-97, 536 N.W.2d 175, 182 (Ct. App. 1995); § 802.08(2), STATS. That methodology has been recited often and we need not repeat it here except to observe that summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *See M & I First Nat'l Bank*, 195 Wis.2d at 496-97, 537 N.W.2d at 182.

¶7 The McDonalds correctly note that Equitable won the “race to the courthouse” with respect to recording a prior interest. See §§ 214.495(1), 706.11(1), STATS. However, they contend that even though they did not have a recorded interest when Equitable recorded its mortgage, their interest was an ownership interest already in existence which divested the Chabrons of any interest they could mortgage. They claim that Equitable’s knowledge of their interest negates its victory in recording first. They suggest that the mortgage was nothing but a fraudulent conveyance as defined in §§ 240.01 and 240.02, STATS.

¶8 The McDonalds did not have an ownership interest sufficient to defeat the recorded mortgage. As to unit five, the McDonalds cancelled the purchase agreement and never closed the sale. The agreement to purchase did not pass title or ownership of the property. See *Dittman v. Nagel*, 43 Wis.2d 155, 163, 168 N.W.2d 190, 194 (1969). While the McDonalds may have had an equitable lien against unit five for purchase money paid, see *Wickman v. Robinson*, 14 Wis. 535, 538 (1861), that lien is superior only to liens and encumbrances filed after the filing of a lis pendens in the action to recover the purchase money, see *Miswald-Wilde Co. v. Armory Realty Co.*, 210 Wis. 53, 68, 243 N.W. 492, 498 (1932), *modified on other grounds*, 210 Wis. 53, 246 N.W. 305 (1933).

¶9 As to unit 4, the McDonalds obtained a lien by virtue of their action against the Chabrons alleging theft by contractor. That lien did not come into existence until so declared by the court—an event which occurred after the recording of Equitable’s mortgage.

¶10 The notice-race recording statutes modify the common law of conveyancing and govern here. See *Kordecki v. Rizzo*, 106 Wis.2d 713, 718, 317 N.W.2d 479, 482 (1982). Section 706.11, STATS., controls the respective rights of

mortgagees and lien holders. *See Grosskopf Oil, Inc. v. Winter*, 156 Wis.2d 575, 583-84, 457 N.W.2d 514, 518 (Ct. App. 1990). Section 706.08(1)(a), STATS., creates an authoritative record of title. *See Kordecki*, 106 Wis.2d at 718-19, 317 N.W.2d at 482. Consequently, the McDonalds' liens are subordinate in view of the sequence in which they were filed. *See Marine Bank Appleton v. Hietpas, Inc.*, 149 Wis.2d 587, 590, 439 N.W.2d 604, 605 (Ct. App. 1989). The recording record did not show that the McDonalds had an interest of any kind in the property when Equitable recorded its mortgage.

¶11 Assuming without deciding that a good-faith notice exception exists to mortgages recorded under §§ 214.495(1) and 706.11(1), STATS., the only way the McDonalds can establish priority outside of the recording statutes is if fraud was involved or Equitable was not a purchaser in good faith. *See* § 706.08(1)(a), STATS. "A purchaser or mortgagee in good faith is one without notice of existing rights in land." *Grosskopf*, 156 Wis.2d at 584, 457 N.W.2d at 518.

¶12 The McDonalds cite the deposition testimony of Merrel Hetznecker, vice president of Equitable Bank, as evidencing Equitable's knowledge of the McDonalds' interest in the condominiums, or at least creating a factual issue about such knowledge. The McDonalds misrepresent the "admissions" made at the deposition.

¶13 Hetznecker processed the Chabrons' loan. While Hetznecker acknowledged that the Chabrons disclosed that there was a dispute with the McDonalds over unit 5 of the project, he did not admit any knowledge that the McDonalds had or asserted an ownership interest in unit five. Hetznecker only knew that the McDonalds had cancelled their purchase agreement. He did not make any inquiries as to the effect of any monies paid by the McDonalds or their

rights to unit five. He learned of the McDonalds' affidavit of interest only after it had been recorded.

¶14 Not only did the McDonalds not have any ownership interest in the property, Equitable did not have actual notice that the McDonalds were making claims that would constitute a lien against the property. The McDonalds' lawsuit against the Chabrons was filed after Equitable recorded its mortgage. Even the McDonalds' affidavit of interest, filed ten days after Equitable's mortgage, made no reference to a lawsuit. The claim against unit four of the project did not arise until after the lawsuit was under way. Equitable could not have had notice of the McDonalds' potential interest in unit four. There is no evidence of fraud.

¶15 There are no material issues of fact. Summary judgment on the McDonalds' counterclaim was correct because Equitable recorded first.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.

