

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**July 26, 2011**

A. John Voelker  
Acting Clerk of Court of Appeals

**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 WIS. STAT. § 808.10 and RULE 809.62.

**Appeal No. 2010AP2336**

**Cir. Ct. No. 2008CV555**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT II**

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**MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC., AS  
NOMINEE FOR NEW CENTURY MORTGAGE CORPORATION,**

**PLAINTIFF-RESPONDENT,**

**v.**

**STEVEN M. REILEY, SABRINA L. REILEY AND M&M CONSTRUCTION,  
LLC,**

**DEFENDANTS,**

**SOLUTIONS PROPERTIES, INC.,**

**DEFENDANT-APPELLANT.**

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APPEAL from a judgment of the circuit court for Walworth County:  
JOHN R. RACE, Judge. *Reversed and cause remanded for further proceedings.*

Before Hoover, P.J., Peterson and Brunner, JJ.

¶1 PER CURIAM. Solutions Properties, Inc., appeals a summary judgment in favor of Mortgage Electronic Registration Systems, Inc. (“MERS”). The issue concerns whose mortgage is in a superior position. We conclude factual disputes precluded summary judgment and therefore reverse and remand.

¶2 This matter arises from the purchase of real estate in Lake Geneva by Steven and Sabrina Reiley from William Roth. The Reileys sought a mortgage from New Century Mortgage Corporation to finance the purchase. New Century approved a loan for \$180,000 but required a first mortgage lien as security. The Reileys also planned to sign a mortgage with M&M Construction, LLC, for \$45,000 at closing. Sheila and Michael Minon were owners of M&M, and the M&M mortgage related to home remodeling.

¶3 New Century sought a title commitment from New Millenium Title Corporation, located in Brookfield. New Millenium contracted with remote agent Gerald Wilcox to act as its agent to close the loan in Walworth County. The closing occurred on December 29, 2006. Sheila Minon recorded the M&M mortgage on January 9, 2007.<sup>1</sup> The deed from Roth and the mortgage to MERS, as nominee for New Century, were recorded on February 5, 2007.

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<sup>1</sup> After closing, Wilcox hand delivered the documents to New Millennium, except for the mortgage to M&M, which was retained by Wilcox. Wilcox faxed to New Millennium the M&M mortgage. Copies of the deed and M&M mortgage as executed at the closing were sent to New Century for certification.

There are discrepancies between the certified M&M mortgage that was faxed to New Millennium and the M&M mortgage that was recorded in Walworth County. The first page of the certified mortgage states that the mortgage was subject to the first mortgage to New Century. The first page of the recorded M&M mortgage states that the mortgage was subject to “NONE.” The fourth page of the recorded mortgage shows a Liberty Banc Mortgage fax number while the certified mortgage does not.

¶4 Nearly a year after the sale to the Reileys, M&M assigned its mortgage to Solutions Properties. Solutions Properties' principal operating officer, Douglas Norton, had contacted the Minons after their names came up as defendants in a foreclosure action. Norton was interested in purchasing their property before it went through foreclosure. Instead, Solutions Properties purchased M&M's mortgage.

¶5 Prior to purchasing the M&M mortgage, Norton received a title report that showed the M&M mortgage to be in first priority. Norton also instructed his assistant to contact the Walworth County Register of Deeds to confirm that the M&M mortgage was recorded prior to other mortgages or liens on the property. Norton also testified at his deposition that the Minons told him "that there was a fire, that there was a \$180,000 second mortgage that was put into the house to improve it and that satisfied any lingering question that I would have had about the 45,000 first and 180,000 second. That was a reasonable explanation to me."

¶6 The Reileys subsequently defaulted on the loan to New Century. When a foreclosure action was about to be commenced, it was determined that the M&M mortgage was recorded prior to New Century's mortgage. MERS then commenced this action for a declaratory judgment to determine the priority of the two mortgages. The circuit court granted summary judgment in favor of MERS, concluding that "the Defendant Solutions Properties was clearly on notice that the Plaintiff's lien was a purchase money mortgage." Therefore, the court reasoned that MERS' mortgage had priority as a matter of law. Solutions Properties now appeals.

¶7 We review summary judgment independently, applying the same methodology as the circuit court. *Green Spring Farms v. Kersten*, 136 Wis. 2d 304, 315-17, 401 N.W.2d 816 (1987). The methodology is often recited and we need not repeat it. Summary judgment is appropriate when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. WIS. STAT. § 802.08(2).<sup>2</sup>

¶8 Solutions Properties argues that under WIS. STAT. §§ 706.08 and 706.09, the M&M mortgage is superior in priority because it was recorded earlier than the New Century mortgage. Solutions Properties contends that it was a good faith purchaser without actual or constructive notice of any adverse claims.

¶9 WISCONSIN STAT. § 706.08(1)(a) protects purchasers of real estate against adverse claims that are not properly recorded as provided by law. *See Associates Fin. Servs. Co. v. Brown*, 2002 WI App 300, ¶9, 258 Wis. 2d 915, 656 N.W.2d 56. It provides that “every conveyance that is not recorded as provided by law shall be void as against any subsequent purchaser, in good faith and for a valuable consideration, of the same real estate or any portion of the same real estate whose conveyance is recorded first.” WIS. STAT. § 706.08(1)(a). A purchaser or mortgagee in good faith is one without notice of existing rights in land. *Grosskopf Oil, Inc. v. Winter*, 156 Wis. 2d 575, 584, 457 N.W.2d 514 (Ct. App. 1990). WISCONSIN STAT. § 706.09(1) provides that “[a] purchaser for a valuable consideration, without notice as defined in sub. (2) ... shall take” priority over an adverse claim. “To be entitled to the benefits of [§ 706.09], a purchaser must not have notice of the adverse claim ....” *Schapiro v. Security Sav. & Loan*

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<sup>2</sup> References to the Wisconsin Statutes are to the 2005-06 version unless noted.

*Ass'n*, 149 Wis. 2d 176, 186, 441 N.W.2d 241 (Ct. App. 1989). Though § 706.08 does not use the word “notice,” the requirement that a bona fide purchaser lack notice of an adverse claim has long been understood to be a part of the statute. *Bank of New Glarus v. Swartwood*, 2006 WI App 224, ¶24, 297 Wis. 2d 458, 725 N.W.2d 944.

¶10 MERS insists Solutions Properties is not a good faith purchaser without notice because, had Norton searched the record, he would have discovered the recording of the mortgage to New Century from the Reileys, which was recorded immediately after the deed. MERS argues that a review of that mortgage shows at the top of the first page in bold letters, “Purchase Money MORTGAGE.” MERS contends that under *Northern State Bank v. Toal*, 69 Wis. 2d 50, 230 N.W.2d 153 (1975), a purchase money mortgage is superior to any other claim as a matter of law.

¶11 However, MERS overstates the holding of *Toal*. The issue in that case was whether Toal’s purchase money mortgage on real estate took precedence over a judgment a creditor held against Toal before he acquired the real estate covered by the mortgage. *Id.* at 51. Toal listed the prior judgment as a debt when he made the home mortgage loan application. *Id.* at 51-52. He later defaulted on the mortgage payments, and the judgment holder and the lender disputed which took priority, the prior judgment or the purchase money mortgage. *Id.* Relying upon authority stating that a purchase money mortgage has priority over earlier judgments and judgment liens against the mortgagor, our supreme court ruled in favor of the lender. *Id.* at 55-56. The court considered, however, only the priority of a purchase money mortgage in relation to pre-existing judgments against the mortgagee, not one mortgage’s priority over another. Accordingly, *Toal* is not dispositive.

¶12 Here, a factual dispute concerning whether Norton performed a reasonable inquiry precluded summary judgment. For instance, Solutions Properties asserts that it contacted Sheila Minon, an M&M principal, and obtained a letter report from her. Solutions also called the register of deeds. MERS concedes that “both Ms. Minon and the register of deeds confirmed that M&M had a first mortgage,” but claims that Solutions Properties “should have been aware that these representations were contrary to the actual record.” However, MERS does not fully elaborate on exactly why this information was contrary to the record. In fact, the record showed that the M&M mortgage recorded prior to the New Century mortgage contained no indication that there were mortgages or liens that had priority.

¶13 In addition, MERS refers to closing documents, including a HUD-1 settlement statement reflecting that the parties to the closing anticipated that a second mortgage in the amount of \$45,000 in favor of M&M was to be recorded after the mortgage to New Century. MERS also refers to the Reileys’ loan application that required New Century be granted a first mortgage lien on the real estate. However, it is unclear whether these documents were available in the public record, or if the documents were even referred to in the public record.

¶14 MERS also concedes a factual dispute concerning whether Sheila Minon told representatives of Solutions Properties “that M&M had a second mortgage that had been recorded as a first.” As mentioned previously, Norton testified at his deposition that the Minons told him “that there was a fire in the house” and that “there was a \$180,000 second mortgage that was put into the house to improve it ....” MERS also insists that Solutions Properties “should have called New Century to inquire as to the nature of its interest ....” However, we have stated that purchasers for value are not required to see if there is any way

conceivable that an interest might possibly be discovered. *See Associates Fin. Servs.*, 258 Wis. 2d 915, ¶14.

¶15 Accordingly, we conclude the circuit court erred by determining that Solutions Properties was on notice of an adverse claim as a matter of law. We therefore reverse the grant of summary judgment and remand for further proceedings concerning the reasonableness of Solutions Properties' inquiry.<sup>3</sup>

*By the Court.*—Judgment reversed and cause remanded for further proceedings.

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

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<sup>3</sup> MERS also argues that the circuit court's decision rested upon equitable principles. However, we cannot discern that the court based its ruling on equitable principles and therefore decline to address the doctrine of equitable subrogation.

