COURT OF APPEALS
DECISION
DATED AND FILED

June 26, 2014

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2013AP2060 **Cir. Ct. No. 2011CV3281**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT II

TRI CITY NATIONAL BANK,

PLAINTIFF-RESPONDENT,

V.

JESS LEVIN,

DEFENDANT,

NATIONAL EXCHANGE BANK & TRUST,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Racine County: JOHN S. JUDE, Judge. *Affirmed*.

Before Blanchard, P.J., Sherman and Kloppenburg, JJ.

¶1 BLANCHARD, P.J. This is a dispute between two banks over the relative priorities of (1) an option to purchase commercial property, held by one bank and (2) a lien created by a real estate mortgage on the same property, held by the other bank.

¶2 The option to purchase the property at issue was first created in 1986 between the property owner, Jess Levin, and the Bank of Elmwood, as part of a lease. In 2009, the lease containing Elmwood's option to purchase was assigned by a receiver to one of the banks that is a party to this appeal, Tri City National Bank.

¶3 The real estate mortgage at issue was secured by this same property. The mortgage was executed and recorded in 2007, in connection with a loan of $1.55 million that Levin took from the other bank that is a party here, National Exchange Bank and Trust.

¶4 In 2011, Tri City executed its option to purchase the property from Levin, while Levin still owed an outstanding balance on the National Exchange mortgage note. Levin failed to produce to Tri City a fee title to the property, free of the lien created by the National Exchange mortgage. In response, Tri City initiated this litigation, seeking an order granting it clear title to the property based on its willingness to pay the price called for under the option to purchase.

¶5 The circuit court ruled for Tri City, with relief that included discharging the lien created by the National Exchange mortgage, on the grounds that the lien is an interest subordinate to Tri City's option to purchase.

¶6 On appeal, National Exchange argues that Tri City never validly exercised its option to purchase the property from Levin. In addition, National

Exchange argues that Tri City's option is subordinate to the mortgage for the following reasons: Tri City executed the option only after National Exchange had executed and recorded the mortgage deed with Levin; the 2009 assignment by which Tri City obtained the option states that the option is subordinate to such encumbrances; the doctrine of equitable subrogation must be applied to avoid the unjust enrichment of Tri City; and, under WIS. STAT. § 706.11(1)(d) (2011-12),[1] the National Exchange mortgage "shall have priority" over Tri City's "lien[] upon the mortgaged premises." National Exchange also argues that the 1986 lease between Levin and Elmwood provides for the exclusive remedies available to lessee Elmwood (and now Tri City, in Elmwood's place) in the event of a non-curable "title defect," which the mortgage debt represents under these circumstances, and that these exclusive remedies do not include any of the remedies granted by the circuit court. We reject each of these arguments and accordingly affirm.

BACKGROUND

¶7 The pertinent facts are not disputed.

1986: Levin Buys New Branch; Initial Financing; Levin Leases Back to Elmwood

¶8 In 1986, the Bank of Elmwood built a new building for a bank branch, the only real property at issue in this case. After the new building was constructed, Elmwood sold the property to Elmwood's president, Jess Levin. Levin financed this purchase with a mortgage loan from F&M Bank.

[1] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

Simultaneously with this purchase, Levin leased the property back to Elmwood for a term of ten years. The 1986 Levin-Elmwood lease on the property included an option for Elmwood to extend the lease term for five additional terms of five years each, or until 2021.

¶9 In addition, and central to the issues on appeal, the 1986 lease also included an option for Elmwood to purchase the property from Levin. Under this option within the lease, Elmwood had the right to purchase the property as of the end of each term, at a purchase price agreed to by the parties or, in the alternative, at a price equal to the average of three appraisals. Under the option to purchase, Levin would be obligated to provide Elmwood with property title free of "all liens, charges, and encumbrances."

1993: Refinancing by Levin with Firstar

¶10 In December 1993, while he still owned the property, Levin borrowed $1.26 million from Firstar Bank Milwaukee, as reflected in a note secured by a mortgage on the property, with the proceeds going to retire the indebtedness secured by the F&M mortgage.

1996: Levin-Elmwood Lease Extended to 2006, Through Amendment No. 1

¶11 As of December 30, 1996, Levin and Elmwood executed what the parties refer to as Amendment No. 1 to the lease on the property, extending the lease ten additional years to December 30, 2006. The 1996 Amendment No. 1 retained the following features of the original lease: the grants to Elmwood of the options to extend the term of the lease in five-year increments to 2021 and the option to purchase.

2006-07: Levin-Elmwood Lease Extension to 2011; Lease Amendment No. 2

¶12 As we discuss below, the parties argue about their legal significance, but the following are undisputed facts relating to interactions between Elmwood and Levin regarding renewal of the lease in 2006-07.

¶13 On August 30, 2006, Elmwood advised Levin that Elmwood was exercising its option under the lease for a five-year extension of the lease, and requested consideration of a ten-year renewal term, with three additional options for extension, each extending for five years, after the expiration of the ten-year extension. On September 7, 2006, Levin's attorney acknowledged these positions of Elmwood. On December 28, 2006, counsel for Elmwood emailed to Levin's counsel what he "believe[d]" to be "the understanding of the parties," including that "[a]t the end of any term, [Elmwood] would be able to purchase the property [or] terminate the lease." On January 3, 2007, counsel for Levin responded directly to this last point, stating in an email that it "correctly states our understanding," although counsel for Levin raised questions about the means to calculate future rent amounts.

¶14 On or about January 24, 2007, the parties executed "Amendment No. 2 of Lease," dated "as of" December 30, 2006. This amendment to the lease reflects the terms stated in Elmwood's August 30, 2006 letter. Amendment No. 2 states, in part, that the lease of December 30, 1996 "shall remain in full force and effect. Except as provided herein, all other provisions of" that lease "are hereby confirmed."

2007: Levin Refinances Property Through National Exchange Note & Mortgage

¶15 A second refinancing on the property by Levin brings National Exchange into the picture. On January 10, 2007, Levin refinanced the property through a mortgage note with National Exchange in the amount of $1.55 million, recorded on January 19, 2007. From the loan proceeds, approximately $1.2 million was disbursed to retire the mortgage debt to Firstar. The National Exchange note contained a schedule for fifty-nine equal payments of principal and interest, maturing in January 2012.

2009: Elmwood Closed; Receiver FDIC and Tri City Enter Purchase and Assumption Agreement, Allowing Tri City to Assume Assignment of Elmwood's Rights

¶16 Tri City comes into the picture after Elmwood was closed by the Wisconsin Department of Financial Institutions. On October 23, 2009, the department appointed the Federal Deposit Insurance Corporation (FDIC) as receiver of the bank. The FDIC, as receiver, and Tri City entered into a Purchase and Assumption Agreement (the assumption agreement). Under the assumption agreement, Tri City had the opportunity to cause the FDIC to assign to Tri City the leasehold interests in all property previously held by Elmwood, including the option to purchase it. Tri City took this opportunity to accept assignment of all leases on Elmwood's property. Under the assignment, the FDIC assigned and transferred to Tri City all of the FDIC's rights to all the property, including Amendment No. 2 to the Levin-Elmwood lease, referenced above, and subject to all encumbrances on the property.

2011-13: Tri City Exercises Option to Purchase; Levin Fails to Produce Clean Title to Tri City at Option (Appraisal) Price

¶17 In August 2011, the chair of Tri City provided written notice to Levin that Tri City would exercise its option to purchase the property pursuant to the lease. Shortly thereafter, Tri City offered to pay $1,056,000, or in the alternative begin the appraisal process outlined in the lease. Levin rejected the $1,056,000 offer and initiated the appraiser selection process. Levin explained that he owed approximately $1,425,000 on the property and could not "either substitute collateral or fund a short sale of the property," and that National Exchange "has indicated that [it] will not accept a substitution of collateral to clear title to the building."

¶18 The average of three appraisals on the property obtained by the parties was $846,666.67. Tri City demanded that Levin accept this price for the property, less closing costs, in exchange for Levin providing a fee title that was clear of the National Exchange lien. Levin's position remained that he could not produce a clear title at a price that was well below his outstanding debt on the property.

¶19 Tri City placed $846,666.67 in escrow and continued to occupy the property.

This Lawsuit; Levin Defaults on National Exchange Mortgage

¶20 Thereafter, Tri City filed this action for specific performance against Levin and National Exchange. Tri City sought an order requiring Levin to sell the property at the appraisal price. Tri City also sought a declaration that the National Exchange mortgage "is junior and subordinate to plaintiff Tri City's Option," and

that upon a sale of the property to Tri City, under the option to purchase, "the mortgage shall be extinguished."

¶21 National Exchange filed both counterclaims and cross-claims.[2] Among National Exchange's claims was that Levin was in default under its note and mortgage "in part by failing to make payment in full" when the note matured in January 2012. Relief sought by National Exchange included a judgment of foreclosure and sale on the property, and an order that the interests of Tri City in the property are "inferior and subordinate to the rights" of National Exchange in the property.

¶22 The circuit court granted summary judgment to Tri City after concluding: while National Exchange is entitled to foreclose on its mortgage with Levin, Tri City's option to purchase is superior to National Exchange's mortgage; Tri City validly exercised its option to purchase; Levin is obligated to convey clean title to Tri City at the option (appraisal) price; and National Exchange's lien should be discharged upon sale to Tri City under the option. National Exchange now appeals.

DISCUSSION

I. Standard of Review

¶23 We review a circuit court's decision on summary judgment de novo, applying the same method as the circuit court. ***Green Spring Farms v. Kersten***, 136 Wis. 2d 304, 315, 401 N.W.2d 816 (1987). Summary judgment is appropriate

[2] Levin also filed counterclaims in the circuit court, but has not joined in this appeal.

when, viewing the facts in the light most favorable to the party opposing the motion, there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. ***Lambrecht v. Estate of Kaczmarczyk***, 2001 WI 25, ¶¶23-24, 241 Wis. 2d 804, 623 N.W.2d 751; WIS. STAT. § 802.08(2). Summary judgment methodology is well established and need not be repeated here. *See, e.g.*, ***Lambrecht***, 241 Wis. 2d 804, ¶¶20-24.

¶24 This case involves contract interpretation, the primary goal of which is to "give effect to the parties' intentions." *See* ***Seitzinger v. Community Health Network***, 2004 WI 28, ¶22, 270 Wis. 2d 1, 676 N.W.2d 426. "We ascertain the parties' intentions by looking to the language of the contract itself," interpreting that language consistently with "what a reasonable person would understand the words to mean under the circumstances." ***Id.***

II. Valid Exercise of Option

¶25 In its principal brief, National Exchange argues that Tri City failed to exercise its option to purchase the property in 2011 according to the strict terms of the 1986 lease agreement, and therefore the option lapsed unexercised. This argument is based on a provision in the lease that states, in pertinent part, that whenever notice is required "such notice shall be given by certified or registered mail." It is undisputed that Tri City communicated notice of its execution of the option through means other than certified or registered mail.

¶26 In response to the argument that Tri City's notice of the execution of its option was fatally defective, Tri City contends that the record reflects that Levin waived the requirement of notice by certified or registered mail. Tri City cites legal authority supporting the view that conditions for acceptance of an option may be waived. National Exchange fails even to address the waiver

concept, either in its principal brief or its reply brief, much less does it present a developed legal argument that defeats Tri City's position. Accordingly, we deem National Exchange to have conceded the point. *See* ***Charolais Breeding Ranches, Ltd. v. FPC Secs. Corp.***, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979) (unrefuted arguments may be deemed conceded).

III. Priority of Mortgage Versus Option to Purchase

¶27 To place in proper context the series of arguments that National Exchange makes in support of its position that Tri City's interest in the property is subordinate to National Exchange's interest, we first briefly summarize some basic legal principles and essential facts that are not in dispute.

¶28 The 1986 Levin-Elmwood lease, containing the option to purchase, was never recorded. Tri City acknowledges the general rule that, under the race-notice statute, WIS. STAT. § 706.08, a mortgagee such as National Exchange may establish priority for a subsequent mortgage over a prior unrecorded lease. *See* § 706.08(1)(a) ("[E]very 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.").

¶29 However, it is also undisputed that, under WIS. STAT. § 706.08, a mortgagee seeking to establish priority over a prior unrecorded lease is required to have taken the mortgage "in good faith," which means that the mortgagee had no knowledge of the prior lease at the time it took the mortgage interest. *See* ***Grosskopf Oil, Inc. v. Winter***, 156 Wis. 2d 575, 584, 457 N.W.2d 514 (Ct. App. 1990). Here, National Exchange does not contend that it was unaware of the lease, and its option to purchase provision, when it took its mortgage interest.

¶30 Turning to more specific rules regarding options within leases, National Exchange concedes that, as a general rule, when a party is assigned a lease, "it receives the benefits and assumes the burdens of the original contract between the parties, including any option to renew the lease." *See* ***Allenfield Assocs. v. United States***, 40 Fed. Cl. 471, 484 (Fed. Cl. 1998); *see also* ***Last v. Puehler***, 19 Wis. 2d 291, 296, 120 N.W.2d 120 (1963) ("[A]n option to purchase in a lease is a covenant running with the leasehold estate.").

¶31 With that background, we turn to the specific arguments advanced by National Exchange that its mortgage had priority over Tri City's option to purchase contained in the lease.

A. Tri City's Option to Purchase Arose After National Exchange's Mortgage

¶32 National Exchange argues that its mortgage on the property predated the option held by Tri City, and therefore the mortgage holds first priority. This timing-based argument comes in two parts, offered as alternatives. Both arguments are premised on the undisputed point that, as summarized above, the note and mortgage securing National Exchange's loan to Levin was dated January 10, 2007, and thus National Exchange seeks to establish that Tri City obtained the option after that time.

¶33 The first of these timing-based arguments rests on the fact that the FDIC-Tri City assumption agreement of October 23, 2009, gave Tri City not an assignment, but instead the exclusive choice of accepting or rejecting an assignment. The consequence of this, National Exchange argues, is that Tri City's decision to accept the assignment created "a new conveyance," which post-dated the 2007 mortgage by thirty-three months. Second, and in the alternative,

National Exchange argues that Elmwood and Levin did not execute their "Amendment No. 2 of the Lease" until on or about January 24, 2007, and therefore "Levin granted the option to purchase after he granted the National Exchange mortgage" by some days. We address these arguments in turn.

1. The October 23, 2009 Assumption Agreement.

¶34 National Exchange's first argument is a narrow one, based on a legal proposition related to the structure of the assumption agreement. This argument begins with the fact that, under the October 23, 2009 assumption agreement, the FDIC made an *offer* of an assignment of the lease, which Tri City had to affirmatively accept in order to make use of the option to purchase within the lease. From this fact, National Exchange argues that, once Tri City accepted the FDIC's offer of assignment in June 2010, this meant that "Tri City's interest in the Property" "c[a]me into legal existence or 'attach[ed]'" for the first time only as of October 23, 2009, the date the offer of assignment of the lease was made to Tri City. In other words, because Tri City obtained from the FDIC only the opportunity to accept the lease assignment, therefore as a matter of law Tri City's eventual exercise of its "right to cause an assignment 'relates back' only to the time the option was granted, October 23, 2009," and does not relate back to the 1986 Levin-Elmwood lease. We conclude that this legal argument is not supported by legal authority.

¶35 To repeat the basic background, the assumption agreement did not exist in 2007 when National Exchange made its mortgage loan to Levin, with knowledge of the Levin-Elmwood lease containing the option to purchase. Thus, National Exchange could not have taken its mortgage interest in Levin's property with any confusion or misunderstanding about the nature of the option to purchase

the property then held by Elmwood, based on the structure of the yet to be created 2009 assumption agreement between the FDIC and Tri City. Instead, National Exchange argues that, as a matter of law, because the 2009 assignment had to be accepted by Tri City, there was in effect a break in the property interest at issue for purposes of lien priority, with a new conveyance created in 2009, contrary to the general rule we cite above, that assignees receive the benefits of options as those benefits existed in original agreements.

¶36 National Exchange cites two sources of authority to support this argument.[3] First, National Exchange points to the statute of frauds, in Chapter 706 of the Wisconsin Statutes, which provides that a conveyance of real property is not valid unless it complies with statutory requirements.[4] However, National Exchange does not point to any provision in Chapter 706 establishing, or even suggesting, that the nature of the leasehold interest that Tri City obtained from the FDIC was newly created as of 2009. As best we can discern, National Exchange is effectively inviting us to read into Chapter 706 a new rule regarding the timing of the creation of property interests for purposes of lien priorities, which we cannot do.

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[3] In addition, National Exchange makes a subargument based on the terms of WIS. STAT. § 704.03(3). However, Tri City submits that this argument is raised for the first time on appeal. National Exchange does not deny in its reply brief that this is a new argument, and therefore we take the point as conceded and decline to address the issue. *See* ***Sate v Huebner***, 2000 WI 59, ¶10, 235 Wis. 2d 486, 611 N.W.2d 727.

[4] In particular, National Exchange cites WIS. STAT. § 706.001(1), which provides in pertinent part that Chapter 706 "shall govern every transaction by which any interest in land is created, aliened, mortgaged, assigned or may be otherwise affected in law or in equity," and WIS. STAT. § 706.02(1)(d), which provides in pertinent part that transactions under § 706.001(1) "shall not be valid unless evidenced by a conveyance that" is "signed by or on behalf of each of the grantors."

¶37 As its second source of purported authority on this issue, National Exchange provides a citation to ***Runke v. Bisbee***, 177 Wis. 77, 187 N.W. 653 (1922). However, National Exchange does not discuss this opinion. In any event, as could be pertinent here, we find in this opinion only a statement of the general rule we relate above, which National Exchange is attempting to distinguish:

> [T]his court has held that where a valid contract for the purchase of land has been entered into, the rights of the purchaser and seller become fixed *as of the date of the contract*; and *that the same is true in the case of an option*. When it is exercised *the rights of the parties, it is claimed, relate back to the time the option was granted*. This may all be admitted to be the law as far as the rights of the vendor and purchaser *and their assigns* are concerned.

Id. at 79 (emphasis added) (citation omitted). So far as these propositions from ***Runke*** appear applicable here, the option was granted to Elmwood in 1986, and when exercised by Tri City in 2011, "relate[s] back to the time the option was granted."

¶38 In sum, National Exchange fails to persuade us that the fact that Tri City was obligated under the assumption agreement to affirmatively accept the offer of an assignment before assignment could occur created "a new conveyance" as a matter of law, and therefore we conclude that the assignment does not represent a new property interest that is subordinate to National Exchange's mortgage, as National Exchange argues.

2. Amendment No. 2 to the Lease.

¶39 National Exchange's second timing argument for superior priority is that Amendment No. 2 of the Lease, dated "as of" December 30, 2006, but not in fact executed until on or about January 24, 2007, "granted new option rights" that replaced all previous agreements regarding an option, all of which "had either

expired or were incapable of being exercised." For this reason, "[n]o enforceable option existed between Levin and the Bank of Elmwood as of January 10, 2007 when the National Exchange mortgage was executed." We reject this argument because National Exchange fails to persuade us that Levin and Elmwood should be treated as not having reached agreement as of December 30, 2006, for purposes of the issues raised in this appeal.

¶40 As an initial matter, we note that National Exchange does not argue that, even if Elmwood's option to purchase existed as a matter of law at the time National Exchange issued the mortgage to Levin, nevertheless aspects of negotiations between Levin and Elmwood in 2006, or up to the time that National Exchange issued the mortgage, obscured from National Exchange the fact that an option to purchase existed, or that these negotiations would have reasonably led National Exchange to doubt the existence of the option. Instead, National Exchange again makes a purely legal argument from uncontested facts, namely, that the option did not exist at the time the mortgage was issued and therefore could not have predated the mortgage.

¶41 With that clarification, we briefly repeat the facts pertinent to this issue. In August 2006, while the 1986 lease with its option to purchase was still in place, Elmwood advised Levin that Elmwood was exercising its option under the lease for a five-year extension of the lease, a position acknowledged shortly thereafter by Levin's attorney. On December 28, 2006, counsel for Elmwood emailed to Levin's counsel what he "believe[d]" to be "the understanding of the parties," including that "[a]t the end of any term, [Elmwood] would be able to purchase the property [or] terminate the lease." Then, on January 3, 2007, Levin's attorney responded directly to this last point that it "correctly states our understanding." Shortly thereafter, Levin and Elmwood memorialized their

agreement to treat Amendment No. 2 to the lease as if it had been reached on December 30, 2006.

¶42 In its principal brief, National Exchange acknowledges that Levin and Elmwood, "*as between themselves*[,] could make Amendment No. 2 effective retroactively to December, 30, 2006." (Emphasis in brief.) Having made this concession, National Exchange rests its argument on authority stating that parties cannot be allowed to deprive third parties of their interests through "fraudulent" back dating of documents. In support, National Exchange cites cases involving clearly fraudulent acts: the backdating of a deed to deprive a creditor of recovery; the backdating of a bill of sale and lease to improperly claim tax deductions; and the backdating of an amendment to an insurance plan to avoid coverage liability that had already arisen. However, Tri City correctly points out that National Exchange fails to support an argument that the "as of" date used by Levin and Elmwood here was for purposes of defrauding National Exchange.

¶43 Apparently recognizing the weakness of its original argument, National Exchange broadens its position in its reply brief. It cites as persuasive authority a North Carolina case that National Exchange asserts "confirms the impropriety of backdating at the expense of a third party (with or without fraud)." It is unclear to us what distinction National Exchange invites us to draw between parties taking steps that improperly cause harm to a third party and parties taking steps that defraud a third party. In any event, however, the North Carolina case bears no resemblance to the facts of this case. In the end, National Exchange fails to present a developed, supported legal argument that we should not treat the Amendment No. 2 to the lease as having been executed as of December 30, 2006, for purposes of this appeal.

B. 2009 Assignment: "Subject to all Encumbrances"

¶44 As a separate priority argument, National Exchange contends that the FDIC and Tri City agreed in the 2009 assignment to Tri City of Elmwood's lease interests that the National Exchange mortgage would have priority over Tri City's option to purchase. National Exchange points to the fact that the assignment stated that Tri City took these interests "*subject to* all encumbrances, liens, defects, conditions, limitations, restrictions, exceptions, reservations, covenants, and any and all other matters or conditions affecting or relating to the Property, such real property leases, or the lands and improvements covered by such leases." (Emphasis in assignment.) National Exchange submits that this language "mandates that Tri City's interest is junior to National Exchange's lien," because the assignment creates the interest at issue and this language establishes that Tri City took the lease interest "subject to" its mortgage lien. However, we agree with Tri City that this argument misreads the assignment, as well as the assumption agreement.

¶45 The assignment unambiguously assigns to Tri City "all rights and interests of the tenants" in the lease, "together with all interests in the lands and improvements covered by such leases to the extent that such interests arise out of such leases." Moreover, in the assumption agreement, the FDIC provided that the conveyance of these leasehold interests would be "as is." As Tri City argues, it is clear from a reading of the assignment and assumption agreement that the encumbrances language emphasized by National Exchange "simply means that Tri City took this Lease 'as is,'" as had been explicitly stated in the assumption agreement. Under the terms of the assignment, what rights Elmwood had, Tri City was now assigned, no more and no less.

C. Equitable Subrogation

¶46 National Exchange argues that the doctrine of equitable subrogation should be invoked here to avoid unjust enrichment of Tri City, with the result that its mortgage is given priority. For the following reasons, we disagree.

¶47 "Subrogation is an equitable doctrine invoked to avoid unjust enrichment, and may properly be applied whenever a person other than a mere volunteer pays a debt which in equity and good conscience should be satisfied by another." ***Rock River Lumber Corp. v. Universal Mortg. Corp.***, 82 Wis. 2d 235, 240-41, 262 N.W.2d 114 (1978). "The object of subrogation '… is to do substantial justice independent of form or contract relation between the parties ….'" ***Id.*** at 241-42 (quoted source omitted).

¶48 It appears that the particular variety of equitable subrogation that National Exchange seeks to invoke here was described in ***Rock River Lumber*** in the following terms:

> Under what is generally termed "conventional subrogation," a lender will be granted subrogation where money is advanced in reliance upon a justifiable expectation that the lender will have security equivalent to that which his advances have discharged, provided that no innocent third parties will suffer. Equity will treat such a transaction as tantamount to an assignment [to the lender] of the original security.

Id. at 241.

¶49 National Exchange argues that, through its 2007 mortgage loan to Levin, National Exchange paid Levin's debt on his 1993 mortgage loan from Firstar, which in turn had paid Levin's debt on his 1986 mortgage loan from F&M. "By satisfying the Firstar debt, National Exchange stepped into Firstar's shoes

who had stepped into F&M Bank's shoes." This is significant, National Exchange argues, because "Firstar's interest in the Property, arising as it does under the December 30, 1993 mortgage[,] is prior to Tri City's interest under the Lease, the [The 1996 Amendment No. 1 to the lease] and the [2006] Amendment No. 2 [to the lease]."

¶50 While our standard of review is de novo, our conclusion on this issue is similar to that of the circuit court. We assume without deciding that, under the doctrine of equitable subrogation, National Exchange could have a first priority position based on its theory that it stands in the shoes of Firstar and F&M. However, the following factors strongly support the conclusion that Tri City is not unjustly enriched at the expense of National Exchange by its exercise of the option to purchase.

¶51 National Exchange was aware of the Elmwood lease and its option to purchase at the time it made the mortgage loan to Levin, but took no steps to subordinate any leasehold rights to the National Exchange mortgage. Indeed, National Exchange was not only aware of the lease, it depended on the stream of payments made under the lease to provide payments on the mortgage loan.

¶52 Further, so far as we learn from any argument National Exchange makes based on the record, no party, including Tri City, ever assured National Exchange that it had a first priority position over any leasehold rights.

¶53 As the circuit court aptly summarized the situation, National Exchange is in a "predicament" not because of any inequitable enrichment of Tri City, but "because [Elmwood] failed, rendering the stock worthless, and Jess Levin is in bankruptcy." National Exchange was not "treated unfairly because it chose not to subordinate the [Elmwood] lease and now has inadequate security."

D. WISCONSIN STAT. § 706.11(1)

¶54 National Exchange argues that WIS. STAT. § 706.11(1)(d) gives its mortgage priority over Tri City's option to purchase, because the option to purchase is a lower-priority "lien[] upon the mortgaged premises," as that term is used in the statute. However, we conclude that National Exchange fails to adequately distinguish its argument from a similar argument previously rejected by this court.

¶55 WISCONSIN STAT. § 706.11 addresses the priorities of mortgages and trust funds. National Exchange argues that the following portions of § 706.11(1) are pertinent here:

> [W]hen any of the following mortgages has been duly recorded, it shall have priority over all liens upon the mortgaged premises …, [with exceptions not pertinent to any argument in this appeal]:
>
> ….
>
> (d) Any mortgage executed to a state or national bank or to a state or federally chartered credit union.

National Exchange argues that the option here is "lien" under the statute, and therefore subordinate to its mortgage.

¶56 However, National Exchange fails to explain why its argument is not foreclosed by ***Grosskopf Oil***. In that case, we held that "sec. 706.11 does not apply to leases." ***Grosskopf Oil***, 156 Wis. 2d at 582 (interpreting the language of WIS. STAT. § 706.11 (1989-90), which has not changed since 1990). Not only is the term "lease" not included in the scope of the statutory language, but a lease is not a lien. ***Id.*** at 583. A lien is a charge on property for the payment of debt, while a lease transfers possessory interests in land. ***Id.***

¶57 National Exchange attempts to distinguish ***Grosskopf*** on the grounds that it did not address options, only leases. However, this argument fails to account for the fact that the option at issue here has priority only because it is part of the lease created in 1986 and later assigned to Tri City. Tri City seeks to enforce a leasehold interest. If there is legal authority that supports the distinction National Exchange attempts to draw, National Exchange fails to cite this authority.

IV. 1986 Lease: Remedies Available to Tri City

¶58 National Exchange makes an additional argument of a different type than those addressed above, in that it focuses on the remedies available to the circuit court in this case, given the terms of the 1986 lease. National Exchange argues that the lease provides the lessee with two exclusive remedies in the event of a non-curable "defect" in title at the time the lessee exercises its option to purchase the property, and those remedies do not include "the right to compel a sale free and clear of the uncured title defect to the detriment of National Exchange." We reject this argument as being premised on a misreading of the lease.

¶59 National Exchange points to the following language contained in the "Option to Purchase" provision of the lease, addressing one aspect of the option of the lessee, Elmwood, to purchase the property:

> If the evidence of title furnished by Lessor [Levin] discloses any *defects in Lessor's title which cannot be cured* and the curing of which Lessee is unwilling to waive, Lessee may withdraw its exercise of this option to purchase and its performance of the contract formed by such exercise shall be excused and this Lease shall continue in full force and effect in accordance with its terms.

(Emphasis added.) National Exchange argues that this was the exclusive mechanism, under the lease, for a lessee such as Tri City seeking to exercise the option to purchase to use in addressing "an uncured defect in title (such as a mortgage securing debt that would not be paid in full with the sale proceeds)."

¶60 There appear to be several shortcomings in National Exchange's remedies argument, but it is sufficient for current purposes to explain our conclusion that the lease does not leave a lessee faced with a noncurable title defect with only two choices: waive the defect, or withdraw its option to purchase. The lease contains a highly expansive remedies provision:

> Remedies Not Exclusive. Any right or remedy conferred on Lessor or Lessee under this Lease shall not be deemed to be exclusive of any other right or remedy which might otherwise be available hereunder or at law or in equity. The rights and remedies hereunder shall be cumulative and may be exercised and enforced concurrently and whenever and as often as occasion therefore arises.

This provision, read in light of the unambiguous directive of the lease that Levin "shall" provide a lessee exercising the option with property title free of "all liens, charges, and encumbrances," leaves no room for the argument that National Exchange now advances regarding the choice a lessee "may" take to waive objection to a defect or withdraw its exercise of the option.

¶61 National Exchange argues that the remedies provision is a more general provision in comparison with the specific provision allowing the lessee to waive objection to a non-curable defect or withdraw its exercise of the option, noting the rule of interpretation that a more specific provision will control a more general provision where there is an inconsistency between the provisions. The problem with this argument is that these provisions are not inconsistent. One provision gives the lessee the choice to withdraw its exercise of the option if a

defect in title cannot be cured, and the other provision allows the lessee to pursue other remedies "concurrently."

CONCLUSION

¶62 For these reasons, we conclude that the circuit court properly granted summary judgment to Tri City and accordingly affirm.

By the Court.—Order affirmed.

Not recommended for publication in the official reports.