STATE OF MICHIGAN

COURT OF APPEALS

FLAGSTAR BANK,

Plaintiff-Appellee/Cross-Appellant,

v

CHARTER ONE BANK,

Defendant-Appellant/Cross-Appellee/Third-Party Plaintiff,

and

DAN HUSSAN and LYNDA L. HUSSAN,

Defendants,

and

LAND TITLE OF LIVINGSTON,

Third-Party Defendant.

UNPUBLISHED
August 25, 2005

No. 253992
Oakland Circuit Court
LC No. 2002-041836-CK

Before: Cooper, P.J., and Fort Hood and R.S. Gribbs*, JJ.

PER CURIAM.

Defendant Charter One Bank ("Charter One") appeals as of right from the bench trial judgment in favor of plaintiff Flagstar Bank ("Flagstar") in this quiet title action. On cross-appeal, Flagstar appeals the denial of its motion for summary disposition based upon equitable subrogation. We affirm the trial court's denial of Flagstar's motion for summary disposition, as its lien did not take priority based upon equitable subrogation. Furthermore, as the trial court improperly determined that Charter One should have closed the Hussans' home equity line of credit, we reverse the judgment in Flagstar's favor.

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* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

I. Facts and Procedural History

In 1998, the Hussans mortgaged their home to Charter One to secure two loans. The first was a conventional loan for $244,000, which was secured by the senior mortgage ("Mortgage A"). The second loan was a ten-year-term home equity line of credit for $66,000 (the "credit line"), secured by a subordinate, future advance mortgage ("Mortgage B").[1] Mortgage B secured a revolving credit line, which permitted the Hussans to draw amounts up to the credit limit throughout the ten-year period. The Credit Line Agreement contained the following cancellation provision:

> You may close your Account as to future transactions at any time by giving us written notice at the address on the reverse side and by returning the loan activators given you. The Checks and ATM Card(s) remain our property and must be surrendered upon request. The closing or cancellation of your Account for whatever reason will not affect your obligation and the terms of the Agreement shall continue to apply to the outstanding balance of your Account until paid in full.

In August of 1999, the Hussans refinanced their property for $331,500 with Flagstar, and executed a mortgage ("Mortgage C") in Flagstar's favor. Flagstar required the Hussans to use these funds to pay off both loans with Charter One, so that Charter One would discharge both mortgages, making Mortgage C the senior security interest. In July, the Hussans requested payoff letters to obtain the exact payoff figures for their loans through August 15, 1999, at a Charter One mini-branch in a Brighton supermarket. Charter One's Consumer Lending Department faxed the payoff letters to the mini-branch. The letters were forwarded to Flagstar, which forwarded them to Jeffrey Street of Land Title of Livingston County, the closing agent, on or around July 21, 1999. The Hussans signed the payoff letter for the credit line and wrote "Please clear and discharge this account."

On the day of the closing, Flagstar wired the funds to Land Title. On August 4, 1999, Land Title issued three checks, in accordance with the refinancing plan, to pay off the Charter One mortgages (Checks One and Two) and to pay $3,645 directly to the Hussans (Check Three). "Check One" was made payable to Charter One in the amount of $243,082.90, the payoff amount of Mortgage A. Mr. Street sent Check One directly to Charter One, which used the proceeds to pay off and discharge Mortgage A. "Check Two" was intended to pay off and close the Hussans' credit line, so that Charter One would discharge Mortgage B. It was also made payable to Charter One in the payoff amount of Mortgage B as of August 6, 1999.

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[1] Both mortgages were timely and properly recorded. Contrary to Flagstar's contention, the recorded future advance mortgage clearly indicates that it secures a home equity line of credit and, in accordance with MCL 565.903a(1)(a), "set[s] forth in a conspicuous manner" the statement "THIS IS A FUTURE ADVANCE MORTGAGE."

When Mr. Hussan picked up Check Three, he asked Mr. Street if he could personally tender Check Two to Charter One to pay off the credit line.[2] Mr. Street agreed, but required Mr. Hussan to sign an affidavit promising to convey Check Two to Charter One by August 6, 1999, and accepting responsibility for any interest that accrued on the payoff amount if he failed to do so. Mr. Street also gave Mr. Hussan the payoff letter with the written instructions to close the account, and instructed him to bring it to Charter One with Check Two.[3]

Charter One's procedure for paying off and closing a home equity line of credit requires the borrower to obtain a payoff letter from the bank's Consumer Lending Department. If the borrower chooses to pay off and close the credit line at a Charter One branch, he must fill out and sign a Payment Exception Ticket, and check the "pay off and close" option.[4] The borrower can submit the Payment Exception Ticket to a bank teller, but the teller cannot complete the transaction at the window. The teller accepts the payment and forwards the Payment Exception Ticket to the Consumer Lending Department, which subsequently closes the credit line.

Mr. Hussan took Check Two to Maxine Joseph's teller window at the Charter One mini-branch on August 4, 1999, but did not follow the standard procedure to pay off and close his credit line. It is unclear whether Ms. Joseph was given the payoff letter with the instruction to close the credit line,[5] but Mr. Hussan clearly did not fill out a Payment Exception Ticket. In the end, Check Two was not used to pay off and close the credit line. Ms. Joseph did not credit the Check Two proceeds to the credit line, nor did she forward a request to close the credit line to the Consumer Lending Department. Instead, Ms. Joseph deposited the proceeds into Mr. Hussan's personal checking account, minus $10,000 in cash, which she tendered to Mr. Hussan. Ms. Joseph stamped the check with a blue endorsement stamp. Two account numbers were written in black ink over the stamp—Mr. Hussan's credit line account number, which was scribbled out, and Mr. Hussan's personal checking account number.[6] Generally, Flagstar claims that Mr. Hussan attempted to pay off and close the credit line, and blames Ms. Joseph and Charter One for mishandling the transaction. Charter One blames Mr. Hussan for converting Check Two and thwarting Flagstar's plan to satisfy the debt and terminate the future advance mortgage.

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[2] Although Mr. Hussan would receive a refund for any excess interest payments, he told Mr. Street that he wanted to deliver the check himself in order to avoid paying the interest that would accrue on the credit line balance between August 4 and August 6, 1999.

[3] Both items were placed together in an envelope.

[4] The other options on the form are "payment," "pay down only, do not close," and "principal curtailment."

[5] In his deposition, Mr. Hussan testified that he delivered Check Two, but not the written instructions to close the credit line. At trial, he testified that he gave Ms. Joseph the envelope unopened.

[6] Ms. Joseph acknowledged at trial that she wrote Mr. Hussan's checking account number on the check, but she denied writing or scribbling out the credit line account number. However, she could not explain how the account number could have been written and scribbled out if she had not done it.

On August 10, 1999, Mr. Hussan withdrew $47,000 from his checking account, and used it to make a payment toward the credit line.[7] He checked the "Payment Only" option on the Payment Exception Ticket submitted with this transaction. Mr. Hussan continued to borrow money from the credit line and obtained balance advances throughout August and September, in amounts ranging from $1,000 to $20,000. Charter One never discharged Mortgage B, yet Flagstar allowed the Hussans to refinance again in 2000, for $50,000.

The Hussans failed to make payments on either their credit line with Charter One or the loan secured by Mortgage C, and subsequently filed for bankruptcy. Flagstar foreclosed on the property and obtained a sheriff's deed on May 29, 2001. Flagstar prevailed at the auction with a high bid of $346,503.26. Charter One also foreclosed on the property and obtained a sheriff's deed on September 11, 2001. Charter One prevailed at this auction with a high bid of $76,356.59. On April 29, 2002, Flagstar sold the property by warranty deed to a third party, Corey D. Mills, for $240,000.

II. Standing

Charter One contends that, as Flagstar had sold the property prior to filing suit, it was not a party in interest and, therefore, lacked standing to quiet title. Whether a party has standing is a question of law, which we review de novo.[8] Flagstar contends that it is the real party in interest as it conveyed the property by a warranty deed. A warranty deed obligates the grantor "to warrant and defend the title" of the property conveyed "against all lawful claims."[9] Accordingly, Flagstar was the proper party to file suit to quiet title.[10]

III. Termination of a Future Advance Mortgage

Charter One contends that, pursuant to the Federal Truth in Lending Law,[11] it could not unilaterally terminate the Hussans' credit line. Charter One challenges the trial court's finding that it had notice of the Hussans' intent to close the credit line and that it was, therefore, required to discharge Mortgage B. Flagstar contends, and the trial court agreed, that Charter One had a statutory duty to discharge Mortgage B, the future advance mortgage, giving priority to Flagstar's subsequently filed Mortgage C. Because an action to quiet title is equitable in nature, and because the court rendered judgment following a bench trial, we review the court's findings of fact for clear error and its conclusions of law de novo.[12] "A finding is clearly erroneous

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[7] It is undisputed that the $47,000 came from the Check Two proceeds.

[8] *Nat'l Wildlife Fed'n v Cleveland Cliffs Iron Co*, 471 Mich 608, 612; 684 NW2d 800 (2004).

[9] MCL 565.151.

[10] MCR 2.201(B).

[11] 15 USC 1601 *et seq*. The statute provides that "[a] creditor may not unilaterally terminate any account under an open end consumer credit plan under which extensions of credit are secured by a consumer's principal dwelling and require the immediate repayment of any outstanding balance at such time" except under very limited circumstances. 15 USC 1647(b).

[12] MCR 2.613(C); *Glen Lake-Crystal River Watershed Riparians v Glen Lake Ass'n*, 264 Mich
(continued…)

where, although there is evidence to support the finding, the reviewing court is left with the definite and firm conviction that a mistake has been made."[13] However, we defer to the trial court's superior ability to judge the credibility of the witnesses.[14] We also review issues of statutory construction de novo.[15]

MCL 565.41 requires a mortgagee to discharge a mortgage as follows:

> (1) Within the applicable time period in section 44(2) after a mortgage has been *paid or otherwise satisfied*, the mortgagee or the personal representative, successor, or assign of the mortgagee shall prepare a discharge of the mortgage, file the discharge with the register of deeds for the county where the mortgaged property is located, and pay the fee for recording the discharge.[16]

However, the Legislature has enacted several statutes solely governing future advance mortgages.[17] Statutes that relate to the same subject or share a common purpose are in pari materia and must be read together as one law.[18]

MCL 565.901(1) defines the terms "future advance" and "future advance mortgage" as follows:

> (a) "Future advance" means an indebtedness or other obligation that is secured by a mortgage and arises or is incurred after the mortgage has been recorded, whether or not the future advance was obligatory or optional on the part of the mortgagee.
>
> (b) "Future advance mortgage" means a mortgage that secures a future advance and is recorded either prior to or after the effective date of this act. . . .[19]

MCL 565.902 provides:

> Except as otherwise provided by this act, a future advance mortgage securing a future advance shall have priority with respect to the future advance as

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(…continued)

App 523, 531; 695 NW2d 508 (2004); *Killips v Mannisto,* 244 Mich App 256, 258; 624 NW2d 224 (2001).

[13] *Glen Lake, supra* at 531.

[14] MCR 2.613(C); *Glen Lake*, *supra* at 531.

[15] *Eggleston v Bio-Medical Applications of Detroit, Inc*, 468 Mich 29, 32; 658 NW2d 139 (2003).

[16] MCL 565.41(1) (emphasis added).

[17] MCL 565.901-MCL 565.906.

[18] *State Treasurer v Schuster*, 456 Mich 408, 417; 572 NW2d 628 (1998).

[19] MCL 565.901(1).

> if the future advance was made at the time the future advance mortgage was recorded.[20]

Flagstar contends that MCL 565.41 requires a mortgagee to discharge a mortgage upon full payment, regardless of whether the mortgagor would otherwise be allowed to continue drawing on the credit line. This interpretation conflicts with those statutes governing future advance mortgages, because it would require discharge of a future advance mortgage whenever the amount of the secured debt is reduced to zero, although the future advance mortgage would otherwise secure future advances with priority over later-recorded mortgages. No statute requires that some balance be owing on a line of credit in order to be secured by a future advance mortgage, and we may not infer that the Legislature intended such a requirement.[21] By using the phrase "paid *or* otherwise satisfied," the Legislature recognized that satisfaction of a mortgage may involve some action other than payment.[22] A future advance mortgage is not "paid or otherwise satisfied" pursuant to MCL 565.41 unless the debt is paid off *and* future advances are terminated, either because the secured credit line has expired or the borrower has closed the account.

It is also clear from the terms of the credit line that paying off the balance would not fully satisfy the Hussans' obligations or terminate the credit line. The Hussans would still have access to the available balance throughout the ten-year term, and Mortgage B would continue to secure any debt incurred from drawing on that balance. Therefore, pursuant to the terms of the credit agreement, the Hussans had to complete two steps to fully discharge their obligation, and invoke Charter One's statutory duty to discharge Mortgage B—pay off the balance owed *and* terminate the credit line as to future advances. The Hussans did neither.

Mr. Hussan did not pay off the balance owed on the credit line on August 4, 1999. Check Two was made payable in the exact payoff amount of the credit line. Ms. Joseph apparently originally planned to apply the Check Two proceeds toward the credit line when she wrote that account number over the endorsement stamp. However, the proceeds were placed into Mr. Hussan's personal checking account, he retained $10,000 of the check proceeds, and he never paid off the balance. The record evidence also reveals that Mr. Hussan did not terminate the credit line as to future advances. Mr. Hussan actually thwarted plans to pay off and terminate the credit line. He failed to redirect the Check Two proceeds toward full payment of his credit line. He also continued to borrow thousands of dollars. Mr. Hussan never affirmatively testified that he gave Ms. Joseph the payoff letter with the written instructions to close the credit line. Although Charter One was aware of the potential refinancing, as it had issued payoff letters on

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[20] MCL 565.902.

[21] *People v Lange*, 251 Mich App 247, 253-254; 650 NW2d 69 (2002).

[22] *Auto-Owners Ins Co v Stenberg Bros, Inc*, 227 Mich App 45, 50; 575 NW2d 79 (1997) ("The word 'or' generally refers to a choice or alternative between two or more things.").

the mortgages, the Hussans never informed Charter One of their intent to actually close the credit line.[23]

Although the Hussans did not pay off the credit line and authorize its termination, the trial court found that Charter One should have realized, from the totality of circumstances, that Check Two was intended to pay off and close the credit line. Regardless of whether Charter One should have made this connection, the Hussans had not authorized Charter One to close the account. The Federal Truth in Lending Law precludes a mortgagee from unilaterally terminating a credit line unless one of the following conditions occur:

> (1) fraud or material misrepresentation on the part of the consumer in connection with the account;
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> (2) failure by the consumer to meet the repayment terms of the agreement for any outstanding balance; or
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> (3) any other action or failure to act by the consumer which adversely affects the creditor's security for the account or any right of the creditor in such security.[24]

Arguably, Charter One could have unilaterally terminated the Hussans' credit line if it had realized that Mr. Hussan fraudulently represented to Flagstar that he had paid off and closed the credit line. However, Mr. Hussan did not follow the normal refinancing procedure, in which the title company would submit the payoff check to the Consumer Lending Department in accordance with Charter One's instructions. The bank teller handling this check during a window transaction would not have the same knowledge as the Consumer Lending Department to correlate the check to previously issued payoff letters. A bank teller would also have no knowledge that the Hussans' senior mortgage had been paid off that day. Therefore, Charter One could not have discovered Mr. Hussan's potential fraud in time to close the account and direct the Check Two proceeds toward payment of the credit line. As a secured debt would remain, Charter One would not be required to discharge Mortgage B, and Flagstar's mortgage would remain in a subordinate position.[25]

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[23] Charter One also argued below that the Hussans never returned the ATM cards and checks associated with the credit line pursuant to the Credit Line Agreement.

[24] 15 USC 1647(b).

[25] Flagstar also argues that Mr. Hussan was able to divert the proceeds of Check Two due to Charter One's "counterintuitive" procedure of allowing customers to deposit checks made payable to Charter One into their personal accounts, instead of restricting such checks for payment toward loans. However, Flagstar presented no evidence that this is an unusual procedure in the banking industry.

Charter One was precluded from terminating the Hussans' credit line without authorization and was not required to discharge Mortgage B as it had not been "paid or otherwise satisfied." Accordingly, the trial court improperly entered judgment in Flagstar's favor.

IV. Equitable Subrogation

Flagstar contends that, even if it was not entitled to judgment on statutory grounds, its interest should take priority under the doctrine of equitable subrogation, as Charter One's mishandling of the refinancing prevented Flagstar from taking the senior security interest. We review claims in equity de novo.[26] Michigan law precludes equitable subrogation for "mere volunteers." Flagstar's failure to seek to be subrogated to the position of Mortgage A during the 2000 refinancing interfered with Charter One's ability to assert its rights. Accordingly, the trial court properly denied Flagstar summary disposition on this ground.

This Court described the doctrine of equitable subrogation in its recent decision in *Washington Mut Bank, FA v Shorebank Corp*:[27]

> Subrogation comes in two forms, which were described by the Supreme Court in *French v Grand Beach Co*[, 239 Mich 575, 580-581; 215 NW 13 (1927),] as follows:
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> "The doctrine of subrogation rests upon the equitable principle that one who, in order to protect a security held by him, is compelled to pay a debt for which another is primarily liable, is entitled to be substituted in the place of and to be vested with the rights of the person to whom such payment is made, without agreement to that effect. This doctrine is sometimes spoken of as 'legal subrogation,' and has long been applied by courts of equity. *Stroh v O'Hearn*, 176 Mich 164, 177[; 142 NW 865 (1913)]. There is also what is known as 'conventional subrogation.' It arises from an agreement between the debtor and a third person whereby the latter in consideration that the security of the creditor and all his rights thereunder be vested in him, agrees to make payment of the debt in order to relieve the debtor from a sacrifice of his property due to an enforced sale thereof. It is wholly independent of any interest in the property which the lender may have to protect. It does not, however, inure to a mere volunteer who has no equities which appeal to the conscience of the court."
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> In *Stroh v O'Hearn*, [176 Mich 164, 177; 142 NW 865 (1913),] the Court also noted that the equitable principle of subrogation is not available to volunteers:
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> "Subrogation is an equitable doctrine depending upon no contract or privity, and proper to apply whenever persons other than mere volunteers pay a

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[26] *Webb v Smith (After Second Remand)*, 224 Mich App 203, 210; 568 NW2d 378 (1997).

[27] *Washington Mut Bank, FA v Shorebank Corp*, ___ Mich App ___; ___ NW2d ___ (June 23, 2005).

> debt or demand which in equity and good conscience should have been satisfied by another. It is proper in all cases to allow it where injustice would follow its denial, and in allowing it all injustice should be guarded against so far as possible."
>
> The principle was again applied in *Lentz v Stoflet*[, 280 Mich 446, 450; 273 NW 763 (1937)]. Indeed, even in *Walker v Bates*, [244 Mich 582, 587; 222 NW 209 (1928),] a case which cannot be reconciled with *Lentz*, the court acknowledged that subrogation is not available to a mere volunteer. See also *Hartford Accident & Indemnity Co v Used Car Factory, Inc*, [461 Mich 210, 215-216; 600 NW2d 630 (1999),] and *Beaty v Hertzberg & Golden, PC*[, 456 Mich 247, 255; 571 NW2d 716 (1997) (for a third party to avoid being classified a mere volunteer, the damage must have been incurred as the result of the third party's fulfillment of a legal or equitable duty owed to the client)].

Pursuant to *Washington Mut Bank*, Flagstar was clearly a "mere volunteer." In that case, this Court found, relying on long-standing precedent,[28] that "the doctrine of equitable subrogation does not allow a new mortgagee to take the priority of the older mortgagee merely because the proceeds of the new mortgage was [sic] used to pay off the indebtedness secured by the old mortgage."[29] The mere fact that a borrower promises to repay the new mortgagee does not remove the volunteer status.[30] A portion of the proceeds from Mortgage C was used to pay off the indebtedness secured by Mortgage A, and another was intended to pay off Mortgage B. However, Flagstar was under no "legal or equitable duty" to the Hussans to undertake the refinancing. Therefore, Flagstar clearly voluntarily entered into this transaction.

The trial court also properly denied Flagstar's motion for summary disposition based on Charter One's defenses of laches and unclean hands. A party raising a defense of laches must show that the opposing party's delay caused some prejudice to the party asserting laches, and that it would be inequitable to ignore the prejudice so created.[31] However, if the opposing party's delay can be satisfactorily explained, it may still obtain relief despite the lapse of time.[32] The clean hands maxim precludes equity "to one tainted with inequitableness or bad faith relative to the matter in which he seeks relief, however improper may have been the behavior of the defendant."[33] The misconduct that warrants preclusion of relief must be related to the

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[28] *Lentz*, *supra*.

[29] *Washington Mut Bank*, *supra* at 6.

[30] *Id.* at 9-10.

[31] *State Dept of Treasury, Revenue Division v Campbell*, 107 Mich App 561, 570; 309 NW2d 668 (1981).

[32] *Id.* at 571.

[33] *Rzadkowolski v Pefley*, 237 Mich App 405, 408 n 1; 603 NW2d 646 (1999) (citations and internal quotes omitted).

transaction at issue, and relief will not be denied because of the general morals, character, or conduct of the party seeking relief.[34]

Flagstar should have discovered that Mortgage B had not been discharged in 2000, when it refinanced the Hussans' property for $50,000. However, it did not claim equitable subrogation until it filed the complaint in the instant case in 2002. By this time, Flagstar and Charter One had both foreclosed on the property, Flagstar had already sold the property to a third party, and the Hussans' bankruptcy action had been completed. Flagstar's delay caused Charter One to miss opportunities to collect the debt secured by Mortgage B. Flagstar's bid at its foreclosure sale was equal to the amount of the remaining debt secured by Mortgage C, but was $103,414 in excess of the amount secured by Mortgage A, the senior security interest to which Flagstar seeks to be subrogated. If Flagstar had sought equitable subrogation before this foreclosure sale, Charter One would have had the opportunity to assert its interests as the junior lien holder by making a claim against the surplus pursuant to MCL 600.3252.[35] Once the foreclosure sale took place, and the redemption period expired, Flagstar's sheriff's deed ripened into legal title and cut off all junior interests in the property.[36] Flagstar's delay also caused Charter One to miss its opportunity to assert its rights as a creditor in the bankruptcy action. Under the circumstances, the trial court correctly denied Flagstar the relief of equitable subrogation based on the laches doctrine. Furthermore, the title company allowed Mr. Hussan to deliver Check Two to Charter One in order to close the credit line. This action allowed Mr. Hussan to evade the refinancing plan.

It would be inequitable to allow Flagstar to be subrogated to Charter One's senior position under the circumstances. Accordingly, the trial court properly denied Flagstar's motion for summary disposition. As Flagstar was not entitled to relief on any ground, we reverse the judgment of the trial court.[37]

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[34] *McFerren v B & B Inv Group*, 253 Mich App 517, 524; 655 NW2d 779 (2002).

[35] See *Schwartz v Irons*, 4 Mich App 628, 631-632; 145 NW2d 357 (1966) (holding that the title acquired by a purchaser at a foreclosure sale is all the right, title, and interest in and to the mortgaged premises possessed by the mortgagor at the time the mortgage was executed, and that the surplus statute, MCL 600.3252, was intended to apply for the protection of subsequent mortgage claimants or lien holders).

[36] MCL 600.3236; *Senters v Ottawa Savings Bank*, 443 Mich 45, 50; 503 NW2d 639 (1993).

[37] Charter One also challenges several of the trial court's evidentiary rulings. However, as we have determined that the trial court erroneously found that Charter One had a statutory duty to discharge Mortgage B, and that Flagstar is not entitled to equitable relief, we need not reach those issues.

We affirm the trial court's denial of Flagstar's motion for summary disposition and reverse the trial court's judgment in favor of Flagstar.

/s/ Jessica R. Cooper
/s/ Karen M. Fort Hood
/s/ Roman S. Gribbs