STATE OF MICHIGAN

COURT OF APPEALS

JP MORGAN CHASE BANK NA and FEDERAL NATIONAL MORTGAGE ASSOCIATION, Plaintiffs-Appellees, v FOUNDERS BANK & TRUST and FOUNDERS TRUST MORTGAGE COMPANY LLC, Defendants-Appellants, and SECOND SUMMIT FINANCIAL LLC, Defendant.	UNPUBLISHED June 23, 2011 No. 297892 Kent Circuit Court LC No. 08-009867

Before: TALBOT, P.J., and GLEICHER and M. J. KELLY, JJ.

PER CURIAM.

This case involves a dispute over the priority of two recorded mortgages. Defendants Founders Bank & Trust and Founders Trust Mortgage Company ("Founders") first recorded their future advance mortgage against property owned by Michael and Rosalynn Hausman ("the Hausman property"). Plaintiff JP Morgan Chase Bank ("Chase") recorded its mortgage at a later date. The trial court found, and we agree, that Founders was required by law to discharge its earlier recorded mortgage, thereby making Chase's mortgage the senior lien. We further agree with the trial court's conclusion that Founders' actions caused Chase unnecessary economic damages following Founders' foreclosure of its illegally retained mortgage. Accordingly, we affirm the trial court's order granting summary disposition pursuant to MCR 2.116(C)(10) to Chase and ordering Founders to discharge its mortgage. We also affirm the trial court's order awarding Chase $40,258.81 in damages.

I. FACTUAL AND PROCEDURAL HISTORY

On February 23, 2004, Founders extended a home equity line of credit of $50,000 to Michael and Rosalynn Hausman. This line of credit was secured by a future advance mortgage using the Hausmans' residence as collateral ("Founders Mortgage"). Founders timely recorded

this mortgage with the Kent County Register of Deeds. The Founders Mortgage indicates that the principal on the secured loan "shall not exceed $50,000" and specifically identifies the $50,000 line of credit. The Founders Mortgage goes on to define the debt secured by the mortgage as including:

> [a]ll future advances from Lender to Mortgagor or other future obligations of Mortgagor to Lender *under any* promissory note, contract, *guaranty*, or other evidence of debt executed by Mortgagor in favor of Lender after this Security Instrument *whether or not this Security Instrument is specifically referenced.* [Emphasis added.]

On May 16, 2005, Founders extended a business loan to the Hausmans' corporation, P.A.L.M. Wireless, with a principle amount of $35,000 ("business loan"). In connection with the business loan, Michael and Rosalynn Hausman individually signed guaranties on the indebtedness. The guaranty documents do not specifically reference the Founders Mortgage, but do indicate that the guaranty would be secured by any existing mortgages between Founders and the Hausmans.

Two days later, Founders recorded a "Modification of Mortgage" and increased the maximum secured principal to $85,000, the total of the line of credit and the business loan. This modification was prepared and filed to accommodate the Hausmans' guaranties on the business loan; however, Founders failed to identify the business loan in the modified Founders Mortgage.[1]

In November of 2006, the Hausmans decided to refinance the indebtedness against their home. Chase loaned the Hausmans funds to pay off a first mortgage with non-party First State Bank. Chase also loaned the Hausmans funds to pay off their indebtedness to Founders. The parties' disagreement centers on whether Chase requested Founders to provide the pay off amount for the "mortgage," such that Founders would be obligated to terminate the line of credit and the business loan and discharge its mortgage, or just "the line of credit," such that Founders could maintain its mortgage to secure the Hausmans' guaranties on the business loan.

Neither party presented evidence to establish the content of Chase's initial inquiry to Founders regarding the Hausmans' indebtedness. In response to that inquiry, however, Founders notified Chase in writing regarding "the payoff information [$49,572.70] for the client [the Hausmans] *and collateral description* [the Hausman property]" (emphasis added). The notification specifically identified the loan number connected with the line of credit. Founders provided only the pay off information for the line of credit and admittedly made no mention of

[1] We do not suggest that Founders' modified mortgage was infirm because it failed to reference the Hausmans' business loan. Indeed a residential future advance mortgage need only be conspicuously labeled and include the maximum principal amount. MCL 565.903a(1). However, Founders' failure to reference the additional loan in the modified mortgage rendered Chase wholly dependent on Founders to reveal this information upon inquiry.

the business loan or the fact that the Hausmans' guaranties were secured by the same mortgage over the Hausman property.[2]

At the closing for the Chase mortgage, Metropolitan Title Company forwarded documentation to Founders indicating that the "mortgage loan" numbered 7700359 (the line of credit) was being paid off and terminated by the funds released. The document instructed Founders as follows:

> If the enclosed check does not pay the loan balance in full, you are hereby instructed to apply the check to the balance due. If additional funds are required, immediately contact the office shown above.
>
> If the loan is being terminated and there are insufficient funds to pay the balance in full, immediately contact the office shown above.
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> * * *
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> Michigan Law provides that: "A Mortgagee or his Personal Representative, Successor or Assign, within 60 days after a mortgage has been paid or otherwise satisfied and discharged, shall prepare and file a discharge thereof with the register of deeds for the county where the mortgaged property is located and pay the fee for recording the discharge." (MCL 565.41)
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> The document also included the following instruction signed by the Hausmans:
>
> Please use this letter as authorization to immediately terminate our Mortgage or Equity Line Account. I/We agree to destroy all unused checks (if any) for this account, and I/We shall no longer access this account in any manner.

Despite the notice from Metropolitan Title, Founders never notified Chase of the remaining balance owed by the Hausmans under their personal guaranties for the business loan and never discharged its mortgage on the Hausman property. Chase, relying on the information provided by Founders, closed on its loan with the Hausmans and disbursed the borrowed funds. Chase then recorded its mortgage ("Chase Mortgage") on December 13, 2006.

Ultimately, the Hausmans filed for bankruptcy and defaulted on the business loan with Founders and the mortgage loan with Chase. When the bankruptcy stay was lifted, Founders foreclosed on the property and sold it to Second Summit Financial at a sheriff's sale for $36,802.04. This sheriff's deed was recorded on May 16, 2008. Twelve days later, on May 28, Chase also foreclosed on the property. Chase sold the property to plaintiff Federal National Mortgage at a sheriff's sale for $185,172.74 and recorded the sheriff's deed on June 26, 2008.

[2] This situation is sometimes referred to as "cross-collateralization." See, e.g., *Union Bank & trust Co v Farmwald Development Corp*, 181 Mich App 538; 450 NW2d 274 (1989).

To protect its interest, Chase subsequently redeemed the property from Second Summit for $40,258.81.

In the meantime, Chase filed suit against Founders, seeking to quiet title to the property and discharge the Founders Mortgage, and seeking the necessary expenses to eliminate Second Summit's interest in the Hausman's property.[3] In its initial and subsequent amended complaints, Chase alleged that it had "obtained pay off information for the outstanding liens of record, including . . . the Founders Mortgage." Chase further alleged that it closed on its mortgage with the Hausmans in reliance on the information provided by Founders to pay off the Founders Mortgage and disbursed funds to Founders with the goal of terminating that mortgage. Chase asserted that Founders accepted the payment but failed to discharge its mortgage or notify Chase that additional funds were owed. Founders then improperly claimed a senior lien and proceeded to foreclose upon and dispose of the Hausman property. Chase alleged that Founders violated MCL 565.41's mandate to discharge the mortgage and should be subject to the remedial provision of MCL 565.44.[4] Chase also asserted that Founders was unjustly enriched when Second Summit purchased the Hausman property because the proceeds were used to pay off the Hausmans' business loan, which should have been paid off and terminated along with the mortgage following Chase's earlier payment.

In response to the complaint, Founders claimed that Chase inquired only about the line of credit, not the indebtedness secured by the mortgage. Accordingly, Founders asserted that Chase made an unfounded assumption that payment of the singular loan would lead to discharge of the future advance mortgage. Ultimately, Founders charged that Chase should have withheld its funds until it actually received a discharge notice from Founders.[5]

The parties later filed cross motions for summary disposition under MCR 2.116(C)(10). In favor of its motion, Chase argued that Founders' recorded mortgage provided constructive, but not actual, notice of the Hausmans' indebtedness to Founders. When Chase made a good faith inquiry into the pay-off amount for the Hausmans' indebtedness and the Hausman property, it was incumbent on Founders to reveal the Hausmans' personal guaranties. Absent such revelations, Chase had no notice of the Hausmans' guaranties on the business loans and, therefore, its lien was entitled to senior priority. Founders, on the other hand, continued to argue

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[3] Chase initially named Second Summit as a defendant and sought an injunction to stay the statutory redemption period in relation to Second Summit's sheriff's deed. However, as noted previously, Chase subsequently redeemed the Hausman property. The parties then stipulated to the dismissal of Second Summit and Chase sought damages to recover the cost of redemption.

[4] MCL 565.41 provides that a mortgagee must file a discharge after "a mortgage has been paid or otherwise satisfied." MCL 565.44, in turn, provides for an award of actual damages as a result of a violation of § 41.

[5] On appeal, Founders continues to argue that Chase put itself at risk by failing to follow industry standards by closing its loan with the Hausmans before it received confirmation of discharge from Founders. However, Founders has never cited any authority for its presumption that industry standards may override legal principles.

that the mortgage had not been "paid or otherwise satisfied" and accused Founders of "self-inflicting" its injury. Founders further contended that its pay off notification "by its terms applied only to the [line of credit]" and did not purport to be a payoff for the entirety of the Hausmans' indebtedness.

The trial court granted summary disposition in Chase's favor. The court found that Founders failed to disclose "the business loan, it's balance, or that it was secured by the mortgage" despite Chase's inquiry. The trial court found that Chase had "attempted to discharge the mortgage" by notifying Founders that the Hausmans' loan was being paid off and terminated and by further instructing Founders to notify Metropolitan Title if additional funds were necessary. Specifically, the court ruled, "Founders can not [sic] withhold relevant information, as it did, twice, and then hide behind its own inaction, claiming that any harm upon Chase was self-inflicted." The trial court entered a separate order requiring Founders to indemnify Chase for the funds paid to redeem the property from Second Summit, but failed to indicate whether the damages were based on the race notice remedy provision of MCL 565.44 or on principles of equity.

This Court granted Founders' delayed application for leave to appeal. *JP Morgan Chase Bank v Founders Bank & Trust*, unpublished order of the Court of Appeals, entered December 2, 2010 (Docket No. 297892).

II. STANDARD OF REVIEW

This Court reviews a trial court's decision on a motion for summary disposition de novo. *Coblentz v Novi*, 475 Mich 558, 567; 719 NW2d 73 (2006).

> "A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint." In evaluating such a motion, a court considers the entire record in the light most favorable to the party opposing the motion, including affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties. Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law. [*Corley v Detroit Bd of Educ*, 470 Mich 274, 278; 681 NW2d 342 (2004) (internal citations omitted).]

This Court reviews the underlying issues of law and equity de novo. *Eggleston v Bio-Medical Applications of Detroit, Inc*, 468 Mich 29, 32; 658 NW2d 139 (2003) ("the interpretation and application of a statute" is a question of law reviewed de novo); *Special Property IV v Woodruff*, 273 Mich App 586, 590; 730 NW2d 753 (2007) (an action to quiet title is an equitable action which is reviewed de novo); *Liggett Restaurant Group, Inc v City of Pontiac*, 260 Mich App 127, 137; 676 NW2d 633 (2003) (whether an unjust enrichment claim can be sustained is a question of a law reviewed de novo).

III. SUMMARY DISPOSITION

We find that the trial court properly granted summary disposition in Chase's favor where Founders violated its statutory duty to discharge its future advance mortgage over the Hausman property. Michigan is a "race-notice" state. This means that a party must record evidence of its

interest in property to place the world on notice. The first to record takes the senior interest in the property and any later recorded interests are deemed junior. MCL 565.29;[6] *Richards v Tibaldi*, 272 Mich App 522, 539; 726 NW2d 770 (2006). In a "race-notice" system, a recorded mortgage acts as constructive notice to subsequent mortgagees "regarding both the existence of the mortgage and the amount of indebtedness that is secured." *Ameriquest Mortgage Co v Alton*, 273 Mich App 84, 93; 731 NW2d 99 (2006). A subsequent mortgagee has a duty to conduct a diligent inquiry to ascertain the nature of that senior interest. *Converse v Blumrich*, 14 Mich 109, 120 (1866); *Seiberling Tire & Rubber Co v State Bank of Fraser*, 78 Mich App 587, 591; 261 NW2d 13 (1978).

A future advance mortgage functions differently than a regular mortgage. A future advance mortgage "secures a future advance," MCL 565.901(b), which is defined as "an indebtedness or other obligation that is secured by a mortgage and arises or is incurred after the mortgage has been recorded. . . ." MCL 565.901(a). See also *Citizens State Bank v Nakash*, 287 Mich App 289, 293; 788 NW2d 839 (2010). To protect the mortgagee's interest, all advances are given priority as of the initial recording date of the document. MCL 565.902; *Deutsche Bank Trust Co v Spot Realty, Inc*, 269 Mich App 607, 613; 714 NW2d 409 (2005).

In this case, Founders recorded its future advance mortgage on March 1, 2004. Therefore, at that time, all advances made under that mortgage were given senior priority to the interests of any subsequent mortgagees. However, before entering into a mortgage with the Hausmans, Chase conducted a title search and discovered Founders' senior future advance mortgage. Given this notice, "[i]t was incumbent upon [Chase] to ascertain the status of the prior encumbrance before making its loan to the mortgagors." *Seiberling Tire*, 78 Mich App at 591. Chase did so by submitting an inquiry to Founders regarding the indebtedness under the mortgage.

At this point we note that if a subsequent mortgagee has a legal duty to ascertain the status of a senior mortgagee, there must be a reciprocal legal duty for the senior mortgagee to provide a response in good faith. As noted by Justice Cooley in *Converse v Blumrich*, 14 Mich at 120-121:

> A person is chargeable with constructive notice where, having the means of knowledge, he does not use them. If he has knowledge of such facts as would lead any honest man, using ordinary caution, to make further inquiries, and does not make, but on the contrary studiously avoids making such obvious inquiries, he must be taken to have notice of those facts, which, if he had used such ordinary diligence, he would readily have ascertained. But he cannot be bound to do more

[6] MCL 565.29, Michigan's "race-notice" statute provides, in relevant part:

> Every conveyance of real estate within the state hereafter made, which shall not be recorded as provided in this chapter, shall be void as against any subsequent purchaser in good faith and for a valuable consideration, of the same real estate or any portion thereof, whose conveyance shall be first duly recorded. . . .

> than apply to the party in interest for information, and will not be responsible for not pushing his inquiries further, unless the answer which he receives corroborates the prior statements, or reveals the existence of other sources of information. . . . *When one seeks the best authority to ascertain the truth of rumors, and is there misled, the person misleading him can hardly be allowed to support rights by insisting that he should still be chargeable with the reports which he had endeavored in vain to verify. The law of constructive notice can never be so applied as to relieve a party from responsibility for actual misstatements and frauds.* [Emphasis added and internal citations omitted.]

Here, regardless of the exact content of Chase's inquiry, Founders responded with an incomplete, misleading, and even false statement.[7] Founders provided a "pay off notice" purporting to apply to the lien on the Hausman property but actually covering only the release of the Hausmans' line of credit. Based on Founders' response, Chase distributed funds to pay off what it believed to be the entire debt and requested that Founders discharge its mortgage. Yet, Founders did not discharge its mortgage or notify Chase of the remaining balance on the Hausmans' business loan. Accordingly, we conclude that the trial court properly granted summary disposition in Chase's favor and ordered the Founders mortgage to be discharged. Given Founders' action, it is appropriate to deem the mortgage "paid or otherwise satisfied" and hold that Founders violated its duty under MCL 565.41 to discharge its future advance mortgage.[8]

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[7] Founders argues at length that Chase was required to present evidence regarding the content of its initial inquiry to Founders. Based on its assumption that this evidence was necessary to the case, Founders accuses the trial court of making unfounded factual determinations to support the award of summary disposition. We disagree with Founders' assessment. Ultimately, Founders provided a pay-off figure that applied to the subject collateral (the Hausman property). Given this notice, Chase naturally believed that its payment would lead to the discharge of the Founders Mortgage and that it did not need to conduct further inquiry.

[8] The trial court's order to discharge the Founders Mortgage is properly supported by the relevant statute, MCL 565.41, as advanced by Chase in the trial court. Accordingly, we reject Founders' assumption on appeal that the trial court relied on the principle of equitable subrogation to elevate Chase's lien to a senior position. However, we would otherwise agree with Founders that the principle of equitable subrogation would not apply to the current case under the reasoning of *Deutsche Bank*, 269 Mich App at 614-615.

We also note, contrary to Founders' arguments, that it is irrelevant to our present review whether Chase is a "bona fide purchaser," i.e. "a subsequent purchaser in good faith and for valuable consideration" under the priority provision of MCL 565.29. Founders was legally required to discharge its mortgage under a separate statutory provision. With the Founders Mortgage discharged on the record, the Chase Mortgage simply becomes senior in the nature course.

IV. REMEDY

The trial court awarded $40,258.81 in damages reflecting Chase's cost to redeem the Hausman property after Founders foreclosed on its mortgage and sold its interest to Second Summit at auction. The trial court failed to cite the grounds on which it based this award. Both parties assume that the award was based in equity. We note that "an equitable remedy is neither necessary nor appropriate where a resolution under the law is available." *Everett v Nickola*, 234 Mich App 632, 637; 599 NW2d 732 (1999). Chase has an adequate remedy at law, the remedial provision of MCL 565.44(1), which Chase cited in its initial complaint. Even if the trial court erred in basing the damages award on equitable principles, we need not reverse its judgment. Reversal is not required where a trial court reaches the right result albeit for a wrong reason. *Coates v Bastian Bros, Inc*, 276 Mich App 498, 508; 741 NW2d 539 (2007).[9]

MCL 565.44(1) provides for a legal remedy for a violation of MCL 565.41:

> If a mortgagee or the personal representative or assignee of the mortgagee, after full performance of the condition of the mortgage, whether before or after a breach of the mortgage, or, if the mortgage is entirely due, after a tender of the whole amount due, within the applicable time period in subsection (2) after being requested and after tender of the mortgagee's reasonable charges, refuses or neglects to discharge the mortgage as provided in this chapter or to execute and acknowledge a certificate of discharge or release of the mortgage, the mortgagee is liable to the mortgagor or the mortgagor's heirs or assigns for $1,000.00 damages. *The mortgagee is also liable for all actual damages caused by the neglect or refusal to* the person who performs the condition of the mortgage or makes the tender to the mortgagee or the mortgagee's heirs or assigns, or to *anyone who has an interest in the mortgaged premises*. Damages under this section may be recovered in an action for money damages or to procure a discharge or release of the mortgage. The court may, in its discretion, award double costs in an action under this section. [Emphasis added.]

Founders' failure to discharge its mortgage pursuant to MCL 565.41 caused actual damage to Chase. When Chase foreclosed on its mortgage with the Hausmans, its mortgage should have been the senior lien. Chase should have taken the Hausman property free and clear of any other mortgages and, therefore, been able to transfer the property free and clear to Federal National Mortgage Association following the sheriff's auction. Instead, Founders foreclosed on the mortgage that it had retained in violation of MCL 565.41. As a result, Chase was required to bear an otherwise unnecessary financial burden—it was required to redeem the property from

[9] Given our conclusion that the trial court's award of damages is soundly based on MCL 565.44, we need not consider Founders' various appellate challenges to an award based on the principle of unjust enrichment.

Founders' successor-in-interest in order to protect its own senior priority position. Accordingly, regardless of its unclear analysis, the trial court reached the correct result when it awarded actual damages to Chase.

Affirmed.

/s/ Michael J. Talbot
/s/ Elizabeth L. Gleicher
/s/ Michael J. Kelly