STATE OF MICHIGAN

COURT OF APPEALS

CHASE MORTGAGE COMPANY,

Plaintiff/Counter-Defendant-Appellee,

V

ARTHUR M. JACKSON,

Defendant/Counter-Plaintiff/Third-Party Plaintiff-Appellant,

and

CHASE MANHATTAN MORTGAGE COMPANY and FEDERAL NATIONAL MORTGAGE ASSOCIATION,

Third-Party Defendants-Appellees.

UNPUBLISHED
January 11, 2007

No. 259627
Genesee Circuit Court
LC No. 03-077907-CH

Before: Borrello, P.J., and Saad and Wilder, JJ.

PER CURIAM.

Defendant/counter-plaintiff/third-party plaintiff, Arthur M. Jackson ("Jackson"), appeals as of right from the trial court's order denying Jackson's motion for summary disposition and granting summary disposition in favor of plaintiff/counter-defendant, Chase Mortgage Company, and third-party defendants, Chase Manhattan Mortgage Company and Federal National Mortgage Association.[1] We reverse.

I.

The facts are undisputed. The property at issue is known as 8419 Mist Court, located in Grand Blanc Township, Michigan (the property). The property was jointly owned by Wallace E.

[1] For ease of reference, we will refer to Chase Mortgage Company, Chase Manhattan Mortgage Company and Federal National Mortgage Association, collectively, as "Chase."

and Bonnie Hoskins (the Hoskinses). The Hoskinses purchased the property in 2000, giving a purchase money mortgage to Greenpointe Mortgage Funding, Inc. (Greenpointe). On February 7, 2001, the Hoskinses gave a mortgage on the property to Jackson. On March 16, 2001, the Hoskinses obtained a refinance loan from Cambridge Mortgage Corporation (Cambridge), giving Cambridge a mortgage (the Cambridge mortgage). Proceeds from the refinancing paid the balance of the Greenpointe mortgage.

On March 21, 2001, Jackson recorded his mortgage. That same day, Cambridge assigned its mortgage to Flagstar Bank. On July 30, 2001, the Cambridge mortgage was recorded. In 2002, Flagstar Bank assigned the Cambridge mortgage to Chase.

Jackson argues that the trial court erred in granting Chase's motion for summary disposition because Chase is a "mere volunteer" not entitled to be equitably subrogated to the position of the original mortgage. Jackson also contends that the trial court erred in denying his motion for summary disposition because his mortgage has priority over the Cambridge mortgage. We agree on both points.

II.

The trial court did not specify which subsection of MCR 2.116(C) it relied on in granting Chase's motion for summary disposition. However, since it considered material outside the pleadings, this Court construes the motion as having been granted under MCR 2.116(C)(10). *Driver v Hanley (After Remand),* 226 Mich App 558, 562; 575 NW2d 31 (1997).

Summary dispositions are reviewed de novo. *Dressel v Ameribank,* 468 Mich 557, 561; 664 NW2d 151 (2003). In reviewing a motion under MCR 2.116(C)(10), this Court must consider the pleadings, admissions, affidavits, and other relevant documentary materials submitted in the light most favorable to the nonmoving party. *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004). Such materials are considered only to the extent they are admissible. MCR 2.116(G)(6).

III.

In *Washington Mut Bank, FA v ShoreBank Corp*, 267 Mich App 111; 703 NW2d 486 (2005), this Court described two forms of subrogation: legal (or equitable) and conventional (or contractual). *Id*. at 113-114. Legal (or equitable) 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. [*Id*. at 113 (citations omitted).]

Conventional (or contractual) subrogation

> 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*. [*Washington Mut Bank, supra* at 113 (citation omitted; emphasis added).]

Subrogation, equitable or conventional, is not available to "mere volunteers." *Id*. at 114.

In *Washington Mut Bank* the plaintiff made a loan to Hanna and Jaklin Shina, secured by a mortgage. *Washington Mut Bank, supra* at 112. A majority of the loan proceeds were used to pay-off a senior mortgage held by Option One Mortgage Corporation (Option One). *Id*. However, at the time the plaintiff bank's loan was made, there were two recorded mortgages in favor of the defendants. *Id*. While the defendants' mortgages were recorded prior to the plaintiff's mortgage, they were not recorded prior to the senior mortgage held by Option One. *Id*. The plaintiff argued that it should "stand in the place" of Option One because the proceeds of the plaintiff's mortgage were used to pay of the senior mortgage held by Option One. *Id*. at 113. This Court rejected that argument, holding that the "plaintiff is not entitled to be subrogated to the original mortgage and receive priority over the intervening lienholders." *Id*. at 128. The *Washington Mut Bank* Court reasoned that the mortgage granted by plaintiff was not necessary to preserve the defendants' interest in the property:

> While defendants certainly have benefited by the new mortgage in that a debt with a higher security interest priority was discharged, there is no indication that defendants were about to lose their security interests if the loan had not been made at the time plaintiff made its loan to the Shinas. [*Id*. at 127.]

The Court noted that "a new mortgage, granted as part of a generic refinancing transaction, [cannot] take the priority of the original mortgage, which is being paid off, giving it priority over intervening liens." *Id*. at 128. *Washington Mut Bank* was affirmed by a special panel of this Court. *Ameriquest Mortgage Co v Alton*, ___ Mich App ___, ___; ___ NW2d ___ (2006).

Furthermore, "the doctrine of equitable subrogation was never intended for the protection of sophisticated financial institutions that can cho[o]se the terms of their credit agreements." *Deutsche Bank Trust Co Americas v Spot Realty, Inc*, 269 Mich App 607, 614-615; 714 NW2d 409 (2005). "*Such lenders are 'mere volunteers'* . . . ." *Id*. at 615 (emphasis added).

Here, Cambridge assigned its mortgage to Flagstar Bank, which subsequently assigned it to Chase. "An assignee stands in the position of the assignor, possessing the same rights and being subject to the same defenses." *Burkhardt v Bailey*, 260 Mich App 636, 653; 680 NW2d 453 (2004). If a mortgage has not been discharged, a mortgage assignee has the same rights as the mortgage assignor. *Id*. at 653-654. Thus, Chase stands in the same position as Cambridge in determining whether the Cambridge mortgage is entitled to be subrogated to the position of the Greenpointe mortgage and have priority over the intervening Jackson mortgage.

The proceeds of the Cambridge mortgage paid-off the Greenpointe mortgage. But this fact is inadequate to allow Cambridge mortgage to succeed *nunc pro tunc* to the position of the Greenpointe mortgage (to, in layman's terms, leapfrog over prior recorded interests). "The doctrine of equitable subrogation does not allow a new mortgagee to take the priority of the older

mortgage merely because the proceeds of the new mortgage were used to pay-off the indebtedness secured by the old mortgage." *Washington Mut Bank, supra* at 119-120. Cambridge entered into the transaction with the Hoskinses voluntarily, and it was not under a legal or equitable duty to the Hoskinses to pay-off the balance of the Greenpointe mortgage. *Deutsche Bank Trust Co Americas, supra* at 616. Additionally, Chase was not under a legal or equitable duty when Flagstar Bank assigned the Cambridge mortgage. Chase took the assignment from Flagstar Bank in the course of a commercial transaction, and Cambridge, Flagstar Bank and Chase are lending institutions not entitled to avail themselves of equitable subrogation. *Deutsche Bank Trust Co Americas, supra* at 614. Accordingly, the trial court erred in granting Chase's motion for summary disposition because Chase is a mere volunteer. *Id*. at 614-615. The Cambridge mortgage is not entitled to be equitably subrogated to the position of the Greenpointe mortgage and take priority over the intervening Jackson mortgage. *Washington Mut Bank, supra* at 128.

The trial court also erred in denying Jackson's motion for summary disposition, because his mortgage has priority over the Cambridge mortgage. Michigan is a race-notice state under the Michigan real property recording act, MCL 565.1 *et seq*. MCL 565.25(4) provides:

> (4) The instrument shall be considered as recorded at the time so noted and shall be notice to all persons except the recorded land owner subject to subsection (2), of the liens, rights, and interests acquired by or involved in the proceedings. *All subsequent owners or encumbrancers shall be subject to the perfected liens, rights or interests.* [Emphasis added.]

Thus, a recorded mortgage serves as notice, and all subsequent interests or encumbrances take subject to previously-perfected liens and interests. MCL 565.25(4); *Piech v Beaty,* 298 Mich 535, 538; 299 NW 705 (1941). Furthermore, MCL 565.29 provides, in pertinent 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.

Thus, a *subsequent* interest holder may take priority over a *previously*-conveyed interest only where the subsequent interest holder takes "in good faith" *and* records first.[2] This is the meaning of "race-notice."

Here, the Jackson mortgage was granted on February 7, 2001, and recorded on March 21, 2001. Cambridge received its mortgage on March 16, 2001, and recorded it on July 30, 2001. Since the Jackson Mortgage was recorded before the Cambridge mortgage, the Jackson

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[2] A "conveyance" is "every instrument in writing, by which any estate or interest in real estate is created, aliened, mortgaged or assigned." MCL 565.35. "A good faith purchaser is one who purchases without notice of a defect in the vendor's title." *Michigan National Bank v Morren,* 194 Mich App 407, 410; 487 NW2d 784 (1992).

Mortgage has priority. MCL 565.29. It is an ancient maxim of law that first in time is first in right. *Cheboygan Co Constr Code Dept v Burke*, 148 Mich App 56, 59; 384 NW2d 77 (1985).

Chase had record notice of the Jackson mortgage. Cambridge assigned its mortgage to Flagstar Bank, which then assigned it to Chase in March 2002. Flagstar Bank assigned the Cambridge mortgage *after* the Jackson mortgage had been recorded in 2001. Thus, the recording of the Jackson Mortgage prior to Flagstar Bank's assignment served as notice to Chase of the Jackson mortgage. MCL 565.25(4); *Piech, supra* at 538. Chase was assigned the Cambridge mortgage with record notice of the Jackson mortgage, and therefore Chase took the Cambridge mortgage subject to Jackson's mortgage. MCL 565.29. Accordingly, the trial court erred in granting Chase's, and denying Jackson's, motion for summary disposition.

IV.

Jackson's mortgage was recorded before the Cambridge mortgage was recorded. Flagstar Bank took its assignment of the Cambridge mortgage with record notice of the Jackson mortgage. Although the Cambridge mortgage paid-off the original Greenpointe mortgage, the Cambridge mortgage is not equitably subrogated to the priority status of the Greenpointe mortgage. The Jackson mortgage has priority over the Cambridge mortgage, and the trial court therefore erred in granting Chase's, and denying Jackson's, motion for summary disposition.

We REVERSE the trial court's order and REMAND for entry of summary disposition in Jackson's favor under MCR 2.116(C)(10). We do not retain jurisdiction.

/s/ Henry William Saad
/s/ Kurtis T. Wilder

S T A T E O F M I C H I G A N

C O U R T O F A P P E A L S

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BORRELLO, J. (*concurring*).

In this opinion, my brother jurists have correctly stated the current status of the law regarding the application of the doctrine of equitable subrogation in this matter. I write separately only to express my profound disagreement with the cursory conclusions reached by this Court in *Washington Mut Bank, FA v ShoreBank Corp*, 267 Mich App 111; 703 NW2d 486 (2005), and the affirmance of that decision by the special panel convened by this Court and announced in *Ameriquest Mortgage Co v Alton*, ___ Mich App ___ NW2d ____ (2006). For the reasons set forth in my dissent in the special panel convened in *Ameriquest*, *supra*, I would not conclude that a new mortgage cannot take the priority of the original mortgage under the doctrine of equitable subrogation. Furthermore, it is my contention that the doctrine of equitable subrogation should be available to "sophisticated financial institutions," such as plaintiff. It escapes me how a persuasive legal rationale can rest solely on the proposition that by labeling plaintiff a "sophisticated financial institution" this Court must therefore preclude such institutions from raising claims under the doctrine of equitable subrogation. Despite my disagreement with such a perfunctory legal assertion, I am nevertheless bound by precedent and therefore write solely to express my opinion that plaintiff should be allowed to proceed in this

matter under the doctrine of equitable subrogation.

/s/ Stephen L. Borrello