STATE OF MICHIGAN

COURT OF APPEALS

GRASS LAKE GOLF CLUB, L.L.C.,

Plaintiff-Appellee,

v

GTR JACKSON PROPERTIES, L.L.C.,[1]

Defendant,

and

TONY FERRIS REVOCABLE TRUST,

Defendant-Appellant.

UNPUBLISHED
April 15, 2008

No. 265408
Jackson Circuit Court
LC No. 05-004091-CH

Before: Fort Hood, P.J., and White and Borrello, JJ.

PER CURIAM.

In this action to quiet title, defendant appeals as of right the trial court's order holding that plaintiff is entitled to foreclose on the property and that defendant's second and third mortgages are subordinate to plaintiff's lien arising from its redemption of the property after foreclosure and sale of the first mortgage. We affirm the trial court's determination that plaintiff holds a valid fourth mortgagee's interest in the property. However, because we conclude that the trial court erred in finding that plaintiff is entitled to be equitably subrogated to the first mortgagee's priority position, we reverse in part and remand for further proceedings.

I. Background

On March 28, 2000, the property, owned by Calderone Farms Golf Ventures, L.L.C. (Calderone Farms), was mortgaged in three transactions. The first priority mortgage, by subrogation of the other two mortgagees, was given to Bank One, securing a loan of approximately $1.8 million. The second and third mortgages were given to defendant (securing

[1] This defendant is a non-party to this appeal. Therefore, reference in this opinion to defendant refers only to defendant Tony Ferris Revocable Trust.

a $25,000 loan), and to Anthony and Catherine Calderone (securing a $65,000 loan). Defendant now holds the Calderone mortgage by assignment.

On November 12, 2003, Calderone Farms executed a fourth mortgage deed, giving a mortgage to either William Newcomb, Jr., and James Auiler, or the Bank of Ann Arbor ("the Bank"). This is the disputed "fourth mortgage." Newcomb and Auiler were equity partners in Calderone Farms and were two of the guarantors of a $240,000 loan made to Calderone Farms in 2001 by the Bank.

Bank One assigned its mortgage interest to General Electric Capital Corporation (GE). GE foreclosed by advertisement, MCL 600.3201 *et seq*., claiming an amount due of $2,093,901.50, and on March 17, 2004, was issued a sheriff's deed, having purchased the property at auction by bidding $1.9 million. On August 10, 2004, GE quit claimed its interest under the sheriff's deed to GTR Jackson Properties (GTR) for $1,462,500. On August 23, 2004, Newcomb and Auiler assigned their interests in the fourth mortgage to plaintiff for $100,000. This assignment was recorded on August 31, 2004.[2] Plaintiff then redeemed the property on September 2, 2004, as the assignee of the fourth mortgage, and GTR executed a certificate of redemption, voiding the sheriff's deed.

On March 7, 2005, plaintiff filed this lawsuit to quiet title, determine priority interests, and ultimately, to judicially foreclose on the property and obtain fee simple title.[3] It alleged that it had a first-secured priority mortgage by virtue of redeeming the property and it also had a fourth-secured mortgage through the assignment from Newcomb and Auiler. It alleged that its interests were superior to those of all other lienors.

After a bench trial, the trial court determined that plaintiff had a valid interest in the property through the assignment of the fourth mortgage from Newcomb and Auiler, and a first mortgage under the doctrine of equitable subrogation because it redeemed the property from the foreclosure. It also found that defendant's mortgages were junior to plaintiff's first mortgage. The trial court ordered that the foreclosure sale amounts were $1,961,775 for plaintiff's first mortgage and $518,314 for its fourth mortgage.

II. Fourth Mortgage

We first address defendant's claim that the trial court erred in concluding that Newcomb and Auiler, and by assignment, plaintiff, had a valid mortgage interest under the fourth mortgage. Defendant contends that a plain reading of the mortgage document reveals that the mortgage was given to the Bank, the entity identified as the lender, and not Newcomb and Auiler. This Court reviews de novo a trial court's holdings in an action to quiet title. *Killips v Mannisto*, 244 Mich

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[2] On August 26, 2004, Newcomb and Auiler assigned their rights in the mortgage to the Bank; this assignment was recorded on October 4, 2004. This assignment was subsequently discharged by the Bank in April, 2005.

[3] It appears that defendant had sought to foreclose its mortgage, which foreclosure was stayed by the court pending resolution of the priority issue.

App 256, 258; 624 NW2d 224 (2001). However, its factual findings are reviewed for clear error. A finding is clearly erroneous if this Court is left with a definite and firm conviction that a mistake has been made. *Alan Custom Homes, Inc v Krol*, 256 Mich App 505, 512; 667 NW2d 379 (2003). Further, this Court reviews de novo issues of contract interpretation. *Archambo v Lawyers Title Ins Corp*, 466 Mich 402, 408; 646 NW2d 170 (2002).

Contracts are to be construed in their entirety. *Perry v Sied*, 461 Mich 680, 689; 611 NW2d 516 (2000). The primary goal in the interpretation of a contract is to determine the intent of the parties. *Quality Products & Concepts Co v Nagel Precision, Inc*, 469 Mich 362, 375; 666 NW2d 251 (2003). When the language of a contract is unambiguous, it is construed and enforced as written. *Id*. A contract is ambiguous "when its provisions are capable of conflicting interpretations." *Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 467; 663 NW2d 447 (2003). However, "[i]f the contract, although inartfully worded or clumsily arranged, fairly admits of but one interpretation, it is not ambiguous." *Meagher v Wayne State Univ*, 222 Mich App 700, 722; 565 NW2d 401 (1997).

The fourth mortgage reads, in part:

> Mortgage Deed
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> THIS MORTGAGE is given by Calderone Farms Gold Venture, LLC, hereinafter called (BORROWER), . . . to William K. Newcomb, Jr., . . . and James A. Auiler, . . . as guarantors of funds borrowed from Bank of Ann Arbor, on behalf of Borrower, and hereinafter called (LENDER), which term includes any holder of this Mortgage, to secure payment of the PRINCIPAL SUM of Two Hundred [] Forty Thousand ($240,000) Dollars together with interest thereon computed on the outstanding balance, all as provided in a Note having the same date as this Mortgage, and also to secure performance of all the terms, covenants, agreements, conditions and extensions of the Note and this Mortgage.
>
> IN CONSIDERATION of the loan made by Lender to Borrower for the purpose expressed above, The Borrower does hereby grant and convey to Lender, with MORTGAGE COVENANTS, the land with the buildings situated thereon and all the improvements and fixtures now and hereinafter a part thereof . . . .

On its face, the document clearly states that the mortgage is given by Calderone Farms "to" Newcomb and Auiler, as guarantors of the $240,000 loan from the Bank.[4] However, the document can also be read as granting a mortgage to the Bank, as the designated "Lender" under the document, although the designation "Lender" includes any holder of the mortgage. The conveyance language in the second paragraph is to the "Lender" and all subsequent references in the document are to the "Borrower" and "Lender," without further reference to Newcomb and Auiler. Thus, the mortgage document is ambiguous.

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[4] From the testimony, it appears that this loan was made to Calderone Farms for operating expenses in 2001.

In ascertaining the meaning of an ambiguous contract, a factfinder must interpret the contract's terms in light of the apparent purpose of the contract as a whole, the rules of contractual construction, and extrinsic evidence of intent and meaning. *Klapp*, *supra* at 469. Ambiguities are construed against the drafter, but only when all other means of contractual interpretation have failed to establish meaning. *Id.* at 470-471.

Michael Calderone, who signed the mortgage for Calderone Farms, along with Newcomb, both signing as Borrower, testified that he thought the mortgage was given to the Bank. However, he also testified that the mortgage was not given to the Bank when the loan was made, the Bank was not present when the mortgage was given, Newcomb prepared the mortgage, and the mortgage recites that it is given to Newcomb and Auiler as guarantors, which they were. He also acknowledged that Calderone had not discharged its indebtedness to the Bank. Defendant suggests that it is implausible that the mortgage was given to Newcomb and Auiler as security for their role as guarantors of the loan because there were four other guarantors. However, the fact that the other guarantors were not part of this transaction simply suggests that Newcomb and Auiler were proactively protecting their interests. The evidence showed that lending money, or guaranteeing a loan, to Calderone Farms involved significant financial risk. Considering the likelihood that Newcomb and Auiler would be required to pay at least a portion of Calderone Farms' debt to the Bank and the fact that the fourth mortgage specifically stated that the mortgage was given "to" Newcomb and Auiler, as guarantors, and the Bank was apparently uninvolved in the mortgage transaction, we find no clear error in the court's finding that Newcomb and Auiler were granted a mortgage interest by the fourth mortgage document. Thus, their assignment to plaintiff gave plaintiff a valid mortgage interest.

III. Priority of Interests

Defendant further asserts that assuming arguendo that plaintiff had a valid interest under the fourth mortgage, the trial court erred in granting plaintiff a first mortgage interest upon its redemption because the law is clear that a redemption after foreclosure of a mortgage does not revive the mortgage. Rather, once the property was sold pursuant to the foreclosure sale, the mortgage debt was satisfied and the first mortgage was extinguished. Although the property was redeemed from the sale, the redemption did not revive the first mortgage, it simply voided the sheriff's deed. Defendant asserts that, accordingly, there is no longer a first mortgage to be foreclosed; defendant holds the two mortgages next in priority; and plaintiff's sole entitlement is to add the redemption amount to its fourth mortgage lien. Defendant argues that the Supreme Court's decision in *Senters v Ottawa Savings Bank*, 443 Mich 45; 503 NW2d 639 (1993), establishes its priority, and the trial court erred in distinguishing *Senters*.

A. *Senters*

While defendant correctly states the effect of a sale and redemption pursuant to a foreclosure by advertisement, MCL 600.3201 *et seq*., we agree with the trial court, albeit for somewhat different reasons, that *Senters* is not controlling. In *Senters,* the defendant held a mortgage on property owned by the plaintiff, which was also subject to several construction liens. The construction liens were foreclosed and the property was sold to Rand Development at a construction lien foreclosure sale, subject to a four-month redemption period. Two and a half months later, the defendant foreclosed its mortgage by advertisement, and purchased the property at the sheriff's sale. *Senters,* 443 Mich at 48. The defendant then redeemed the property from

the construction lien foreclosure sale two days before the redemption period would have expired. After this redemption, the defendant filed an affidavit of interest stating that redemption from the mortgage foreclosure sale would require payment of the amount paid to redeem the property from the construction lien foreclosure sale as well as the bid price at the mortgage foreclosure sale, plus interest. *Id*. Just before the redemption period on the mortgage foreclosure sale expired, the plaintiff paid the defendant that sale's bid price plus interest, asserting that she was not required to also pay the amount the defendant paid to redeem the property from the construction lien foreclosure sale. *Id*. at 48-49. The trial court and the Court of Appeals ruled in favor of the defendant. Our Supreme Court reversed.

The Supreme Court reasoned that a foreclosure sale by advertisement was governed by statute:

> Upon a foreclosure sale, the mortgage debt is considered paid and the mortgage lien discharged. *Wood v Button*, 205 Mich 692, 701; 172 NW 422 (1919). If the mortgagee purchases the property at the sale, it stands in the position of an ordinary purchaser and obtains an ownership interest in the land, subject to the mortgagor's opportunity of redemption. *Doyle v Howard*, 16 Mich 261, 265 (1867). In order to redeem the property from the mortgage foreclosure sale by advertisement under the plain meaning of MCL§ 600.3240 [MSA cite], plaintiff must pay the bid price plus interest, and any amount for taxes and insurance that the purchaser has properly filed with the register of deeds. [*Senters*, 443 Mich at 50.]

The Court reviewed a number of cases that held that the rights of the parties where there has been a foreclosure by advertisement are controlled by the statute, and that equity cannot enlarge or diminish those rights. In such cases, mortgagees who paid attorney fees or taxes after the sale were held not to be able to revive the mortgage to secure those payments. These cases reasoned that the foreclosure sale extinguished the mortgage; that the right to redeem by paying the amount bid by the purchaser, plus additional amounts allowed by statute, was fixed by statute and no other amounts were allowed, and that when the mortgagor redeemed the property from the mortgage foreclosure sale, the mortgagor obtained legal title to the property free of the mortgage lien. The *Senters* Court concluded that rights of the mortgagor were similarly fixed by statute.[5]

The *Senters* Court also considered whether the defendant could properly be granted an equitable lien for the amount paid to redeem from the construction lien. The Court discussed prior cases recognizing equitable liens in somewhat similar circumstances, and concluded that such a remedy was available in those cases because it did not conflict with a statute, but that equity could not change the amount necessary to redeem under the foreclosure by advertisement statute.

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[5] We note that the outcome dictated by *Senters* was changed by the Legislature's subsequent amendment of MCL 600.3240 in 1994, which included amounts paid to redeem senior liens from foreclosure in the redemption amount.

Plaintiff argues that *Senters* is inapplicable in the instant case because plaintiff seeks foreclosure in equity, rather than by advertisement. Defendant asserts that plaintiff's method of foreclosure is irrelevant to the question of the effect of plaintiff's redemption from the foreclosure sale. We agree that *Senters* controls to this extent: GE, who was assigned Bank One's mortgage interest, foreclosed by advertisement on the property. Thus, the lien was discharged upon sale, and when plaintiff redeemed the property, the sheriff's deed was voided and Calderone Farms was restored to legal title to the property, free of the extinguished first mortgage, but subject to the subsequent mortgages.[6]

The remainder of the *Senters* holding--that the amount paid to redeem the construction lien could not be added to the amount necessary to redeem as an equitable lien--is, however, inapplicable because no right to redeem is at issue here,[7] and, further, the matter before the court is a foreclosure in equity. The foundation of the *Senters* holding is that once the statutory foreclosure sale was held, the amount necessary to redeem was fixed by statute at the sale price

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[6] We note that some state statutes place the redeeming junior lien holder in the position of the purchaser at the foreclosure sale. Osborne, Mortgages (2d ed), § 310, pp 644-646. Such a junior lien holder would then hold title to the property subject only to the mortgagor's or other mortgagees' rights to redeem. Upon a failure to redeem, the title becomes absolute. Michigan is not such a state. In Michigan redemption results in a voiding of the foreclosure purchaser's deed and a reinstatement of all liens, except the one redeemed. Under an earlier Michigan statute, discussed in *Johnson v Johnson*, Walker 330 (MI 1843), a junior mortgagee's redemption of the premises from a prior mortgage resulted in the junior mortgagee's assuming the rights of the prior mortgagee, rather than the purchaser. "Any person to whom a subsequent mortgage may have been executed, shall be entitled to the same privilege of redemption of the mortgaged premises that the mortgagor might have had, or of satisfying the prior mortgage, and shall by such satisfaction acquire all the benefits to which such prior mortgage was or might have been entitled." *Id*. at 333-334. In applying this statute in a dispute between a second mortgagee and Prickett, who was both the purchaser of the mortgagor's interest during the period of redemption and the assignee of the mortgagee's interest after the mortgagee had bid at the foreclosure sale, the chancellor observed "If complainant [second mortgagee], then, had redeemed instead of Prickett, the only right he would have acquired would have been to be reimbursed what he had paid, with interest, on foreclosing his own mortgage." Subsequent to this decision, the statute was amended to remove the distinction between the effect of redemption by the mortgagor and subsequent mortgagees, either redemption resulting simply in the foreclosure sale being void. After this change, decisions held that those holding under the mortgagor, such as a subsequent mortgagee, could either redeem as a matter of right, or acquire the interest of the purchaser at the foreclosure sale as a matter of contract, and, if the latter, the subsequent mortgagee would hold its interests subject only to the right to redeem, rather than subject to liens revived pursuant to redemption. It must be noted that plaintiff did not acquire the purchaser's interest by contract, or the first mortgagor's interest by statute upon redemption, the statute having been amended; rather, plaintiff obtained a redemption lien in equity.

[7] In fact, if defendant were asserting a right to redeem as a lienor junior to the mortgage that was foreclosed (the Bank One mortgage) and superior to the mortgage that was the basis for redemption (the fourth mortgage), there would presumably be no issue because that is exactly the effect of the trial court's ruling. To wit, defendant must pay the statutory redemption amount to plaintiff if it wishes to preserve its lien.

and certain additions permitted by the statute. The *Senters* Court stated that where the requirements for redemption are governed by statute, equitable relief cannot be given absent fraud, accident, or mistake. 443 Mich at 55-56. Because there was no allegation of fraud, accident, or mistake, the *Senters* Court declined to establish an equitable lien, which would have given the defendant the right to recoup the amount it expended at the construction lien foreclosure sale. *Id*. at 56-58.

Defendant asserts that the same result is warranted here because plaintiff makes no allegation of fraud, accident, or mistake. However, in *Senters*, the defendant was asking that the statutory redemption requirements be disregarded and that equity allow it to recover the money it expended redeeming the property from the construction lien foreclosure sale. Here, plaintiff's claim of equitable subrogation does not affect the statutory redemption scheme. The property was redeemed from the statutory foreclosure for the amount set forth in the statute and the first mortgage lien was extinguished. Bank One, GE and GTR no longer have any rights, and Calderone Farms has been restored to title. Like the defendant in *Senters*, plaintiff asserts that, upon redemption from the statutory foreclosure sale, the property was encumbered with an equitable lien. However, the similarity ends there. In *Senters* the equitable lien was asserted against the mortgagor, and was claimed to have arisen after the sale and prior to the redemption, and to have changed the amount necessary to redeem, contrary to the statute. Here, the equitable lien is asserted not against the mortgagor, but against another mortgagee; the lien arises from the redemption itself and is not claimed to affect the amount necessary to redeem, thus not implicating the statute.

The *Senters* Court observed that had the defendant chosen to foreclose by judicial action in equity, rather than by advertisement under the statute, it might have raised its equitable defense. The Court also observed that had the defendant waited until it redeemed from the construction lien before conducting the foreclosure sale under the statute, it could have added the redemption amount to its mortgage lien and the redemption amount would thus have been included in the foreclosure sale price, and consequently in the amount necessary to redeem under the statute. Thus, *Senters* did not preclude the trial court from granting plaintiff an equitable lien for the redemption amount.

B. Equitable Lien

Michigan case law has long recognized a junior lien holder's right to redeem the property from a superior lien in order to protect the junior interest. *Carter v Lewis,* 27 Mich 234, 240, 242 (1873); *Powers v Golden Lumber Co*, 43 Mich 468; 5 NW 656 (1880); *Sager v Tupper*, 35 Mich 127, 133, 135-136 (1876). Indeed, defendant does not challenge this statement of the law. Rather it challenges the effect of that redemption.[8] Case law also recognizes that the redeeming junior lien holder then holds a separate lien for the redemption amount, and that subsequent lien holders hold their interests subject to this redemption lien. In *Powers*, the plaintiff redeemed from the foreclosure of a prior mortgage in order to protect his junior mortgage interest. He then

[8] Of course, defendant also challenges whether plaintiff actually acquired rights under the fourth mortgage, which challenge we reject in our discussion of the fourth mortgage, *supra.*

sought to enforce a redemption lien against subsequent "encumbrancers and purchasers." After bringing the action, his junior mortgage became due and it was paid and discharged. However, because only the amount due under his mortgage was paid, and not the amount he paid to redeem from the first mortgage, he pursued foreclosure and enforcement of his redemption lien. The defendants, subsequent encumbrancers and purchasers, asserted that his action was premature and that the discharge of his mortgage cut off his lien for the redemption money. The Court determined that anyone with an interest in the mortgaged property has a right to redeem, and that having done so, the plaintiff had a right to file suit to enforce his redemption lien any time after it became fixed, without regard to whether his own mortgage was yet payable:

> While a sale on statutory foreclosure satisfies the debt secured by the foreclosed mortgage to the extent of the proceeds of the sale, and thus far releases the personal obligation, yet any party redeeming gets such an interest in the land as is necessary to protect him. And if he is a subsequent encumbrancer, who has advanced the money to protect his security, the redemption creates no merger of liens, but those who stand later in the order of title or security must pay the redemption money which he advances for the benefit of their titles, as well as his mortgage which made the advance necessary. These two claims are separate and distinct, and paying one cannot, in good sense or reason, have any effect to release the other.
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> Powers had a right to file his bill to enforce his redemption lien at any time after that lien became fixed. A bill to enforce it would have been defective unless it had brought in all the subsequent liens and titles. 1 Dan. Ch. Pr. 261 *et seq*. The fact that his own mortgage had not yet become payable did not make it any the less a security involved in the enforcement of this lien, and necessary to be disposed of on a final redemption or foreclosure. Its subsequent payment did not lessen the amount unpaid on the lien which was superior in time. The money paid on the statutory redemption was a separate payment to the benefit of all existing claims, which would have been destroyed had the foreclosure become absolute. It cannot concern the liability of these subsequent claims to be subjected to the lien that some other intermediate lien has been transferred or discharged. It cannot hurt them if the holder of this lien allows a part of his liens to be discharged instead of requiring payment of the whole, any more than if he had accepted part payment on an ordinary mortgage and given time on the rest, or accepted payment of one of two successive mortgages and retained the other. *Baker v. Pierson* 6 Mich. 522.
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> Nothing can relieve the land of complainant's lien except its payment or voluntary discharge.

> We think the decree directing a sale and foreclosure is valid and should be affirmed. . . . [*Powers, supra*, 43 Mich at 471-472.][9]

While *Powers* clearly establishes a redeeming mortgagee's right to a redemption lien, it does not address the dispositive issue here, whether the redemption lien has priority over intervening liens. In *Powers*, the redeeming mortgagee's lien was already superior to those of the defendants. Other cases speak of the redeeming mortgagee adding the redemption amount to his lien, but do not directly address the priority issue. Indeed, we have been able to discover no case or discussion of law directly on point. Thus, while it is clear that plaintiff is entitled to a lien for the amount paid to redeem the first mortgage, the priority position to be accorded that lien in relation to intervening liens is nowhere dealt with specifically in any case or treatise, and appears to be a matter of equity.

The lien thus vested in the redeeming junior mortgagee has been referred to as a "redemption lien," *Powers, supra,* ("Powers had a right to file his bill to enforce his redemption lien at any time after that lien became fixed")*;* an interest through "subrogation," *Sanger, supra* at 135-136, ("[c]omplainant had an absolute right, at any time after the [prior] mortgage became due, to redeem it and be subrogated to it until his own mortgage should be paid up with it, and his entire claim refunded"); and an "assignment" of the prior mortgage interest, *Lamb v Jeffrey*, 41 Mich 719, 721; 3 NW 204 (1879) ("[t]here is no doubt of the right of a second mortgagee to redeem from the prior mortgage, and to have the benefit of an assignment.") Whatever the terms used, it is clear that this interest is an equitable right.

Equitable subrogation is a legal fiction. *Auto-Owners Ins, supra* at 59. It "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." *Washington Mut Bank, FA v ShoreBank Corp*, 267 Mich App 111, 113; 703 NW2d 486 (2005) (internal quotation and citation omitted). A subrogee may not be a "mere volunteer who has no equities which appeal to the conscience of the court." *Id.* at 113. That is, the person paying the debt stands in the position of surety where he has been compelled to pay the debt of another to protect his own rights. *Michigan Hosp Service v Sharpe*, 339 Mich 357, 374; 63 NW2d 638 (1954).

Plaintiff asserts that it was not a volunteer because it was protecting its fourth mortgage interest. Defendant argues that plaintiff is a mere volunteer because it voluntarily purchased the fourth mortgage after the foreclosure sale, doing so for the express purpose of purchasing an interest in the property that it could then save through redemption; plaintiff could have avoided

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[9] We also note at this juncture that the manner in which the junior mortgagee discharges the first lien is crucial. If the junior mortgagee purchases the property at the mortgage foreclosure sale or purchases the interest of the purchaser at the sale, the junior mortgagee attains absolute title subject only to the mortgagor's right of redemption, and free of any other mortgage liens. *Sanderson v Ressler*, 223 Mich 232, 234-235; 193 NW 829 (1923); *McCreery v Roff*, 189 Mich 558; 155 NW 517 (1915). This was not, however, what took place in the instant case.

the need to protect its interest by redemption by not purchasing the fourth mortgage when the first mortgage was already in foreclosure.

Regardless of plaintiff's motivation in obtaining its interest, it did, in fact, have a junior mortgage interest when it redeemed the property. Unlike the banks in *Washington Mutual* and *Ameriquest Mortgage Co v Alton*, 273 Mich App 84; 731 NW2d 99 (2006), which banks advanced money in exchange for a mortgage, which money was used to pay off a first priority mortgage, and which banks then asserted a right to equitable subrogation to the position of the first mortgagee, notwithstanding the existence of duly recorded intervening mortgagees, here, plaintiff was not a stranger to the title when it redeemed. The *Washington Mutual* and *Ameriquest* Courts observed that:

> we are unaware of any authority regarding the application of the doctrine of equitable subrogation to support the general proposition that a new mortgage, granted as part of a generic refinancing transaction, can take the priority of the original mortgage, which is being paid off, giving it priority over intervening liens. . . . Such bolstering of priority may be applicable where the new mortgagee is the holder of the mortgage being paid off *or where the proceeds of the new mortgage are necessary to preserve the property from foreclosure or another action that would cause the intervening lien holders to lose their security interests.* [273 Mich App at 97, quoting *Washington Mutual, supra* at 128. Emphasis added.]

Here, plaintiff's redemption did, in fact, preserve the intervening lien holders rights in the property by restoring Calderone Farms' title, which then continued to be subject to defendant's mortgage liens. Thus, *Washington Mutual* and *Ameriquest* do not compel a conclusion that plaintiff was a mere volunteer.

We also reject defendant's argument that the trial court's grant of equitable relief was inappropriate because the relief was outside the scope of plaintiff's pleadings and defendant had no notice that plaintiff might seek equitable relief. Plaintiff specifically stated that its action was brought under MCL 600.2932 to determine the parties' priority interests and quiet title to the property. Actions under this statute are equitable in nature. MCL 600.2932(5). Additionally, although plaintiff did not cite the judicial foreclosure statutes, MCL 600.3101 *et seq*., it stated that its action was "brought to judicially foreclose" on the property. Such an action is also equitable in nature. MCL 600.3180. Further, plaintiff clearly raised the issue in its opening statement at trial, and defendant responded on the merits, rather than asserting that the issue was improperly raised at that point.

C. The Equities

Having concluded that none of defendant's arguments based on statute, case law or the pleadings present a bar to the trial court's grant of equitable relief to plaintiff, placing it in first priority, we consider whether the trial court properly determined that equity supports the granting of such relief here.

As plaintiff observes, defendant and the Calderones had the right and opportunity to protect their mortgage interests by redeeming, but chose not to, or were unable to, do so. Had

plaintiff not redeemed, defendant's and the Calderones' interests would have been extinguished. Plaintiff's redemption reinstated their liens and restored their rights. Granting plaintiff a priority position with respect to the redemption amount places defendant in no worse a position than before the foreclosure sale and redemption, and in a better position because defendant now has an additional opportunity to redeem. The trial court was persuaded by the equity of this position.

On the other hand, as defendant observes, plaintiff purchased a fourth mortgagee's interest for $100,000 with notice of the preexisting liens, and with notice that the first mortgage lien had been sold at a foreclosure sale. Thus, plaintiff understood that the property would have to be worth over $100,000 more than the sum of the amounts owing on the three intervening mortgages in order for it to recoup its investment in the fourth mortgage and, further, that if Calderone Farms and the intervening mortgage holders did not redeem, plaintiff would have to do so to protect its investment. In fact, plaintiff's objective was not to preserve its lien, but rather to foreclose and obtain title. Plaintiff was well aware that there were two mortgages that had priority over the fourth mortgage that it was buying, that it would probably have to pay the redemption price itself in order to preserve its interest in the fourth mortgage, and that the redemption would revive the intervening mortgages as well as its own. Under these circumstances, placing plaintiff in a fourth priority position with respect to both the fourth mortgage and the redemption lien simply recognizes that plaintiff purchased a fourth-secured interest in the property and then made the economic decision to protect it, apparently concluding that the value of the property supported the investment.

We conclude that the trial court erred in granting plaintiff's redemption lien a first priority position. Equitable relief is not granted simply because it does not harm the intervening lien holder; rather, it is denied if it does. *Ameriquest*, *supra.* Further, while it is accurate to state that defendant would not be placed in a less advantageous position by the Court's granting plaintiff a priority position, it is also accurate that plaintiff is not placed in a less advantageous position by the Court denying it such a priority position.[10] Plaintiff does not stand to lose the $1.9 million it paid to redeem the property. Rather, in order to obtain clear title upon foreclosing on its redemption lien, it must recognize the two intervening liens of defendant. And, as a junior

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[10] Neither party will be placed in a worse position than it was before the redemption by granting the other party priority. On the other hand, both parties will be in a better position than otherwise if granted priority. If defendant prevails, it will benefit because its mortgage interests will no longer be subordinate to a large first mortgage, and plaintiff will be required to pay off the loans to discharge defendant's liens. If plaintiff is granted priority, it will benefit by eliminating defendant's liens, without having to discharge them by payment, as it would have had to do to foreclose on its fourth mortgage interest. In one case, defendant would enjoy a windfall because its second and third priority interests would have been saved and elevated by plaintiff's redeeming to preserve its fourth priority interest. In the other, plaintiff would be permitted to eliminate defendant's legitimate intervening liens by purchasing a fourth priority lienor's right to redeem and jumping ahead of the intervening liens.

lienor, it must redeem from defendant's foreclosure sales in order to preserve its interest in the property. Plaintiff is in no worse position by virtue of its redemption of the first mortgage because, as discussed above, it purchased a fourth-priority position, invested an additional $1.9 million to preserve that position, and now retains a fourth-priority lien for the entire amount of its investment, including all sums paid to redeem from the first mortgage. Plaintiff can extinguish defendant's interest in the property simply by paying off the intervening mortgages, which is exactly the position it was in when it purchased the fourth mortgage.

Defendant's position is no less entitled to the protection of equity than plaintiff's. While plaintiff observes that defendant had a right to redeem and protect its lien, in the same manner as did plaintiff, the reality is that defendant and its assignor held small liens in comparison with the amount necessary to redeem, and it was entirely understandable that they would not be in a position to redeem to protect the liens. Plaintiff purchased the fourth mortgage so that it could ultimately obtain title through redemption and foreclosure. Thus, its concerns in redeeming were different from defendants. The issue was not whether to pay $1.9 million to redeem to protect a $100,000 investment, but, rather, whether to pay a total of $2 million, and possibly more if required to redeem from the intervening mortgages, to obtain clear title to the property. We see no reason why equity should be required to come to the aid of plaintiff to assist it in obtaining title by foreclosing its redemption lien derived from its position as a fourth mortgagee, without discharging the liens of the second and third mortgagees, whose interests, although valuable, did not justify redemption from the first mortgage.

Because of our disposition of the priority issue, we need not address defendant's argument that the court erred in determining the amount of plaintiff's liens.

Affirmed as to the validity of the fourth lien. Reversed and remanded with respect to the priority issue. We do not retain jurisdiction.

/s/ Karen M. Fort Hood
/s/ Helene N. White
/s/ Stephen L. Borrello