

STATE OF MICHIGAN
COURT OF APPEALS

MORTGAGE ELECTRONIC REGISTRATION
SYSTEMS, INC., as nominee for QUICKEN
LOANS, INC.,

UNPUBLISHED
June 10, 2008

Plaintiff-Counter-
Defendant/Appellant,

v

No. 277343
Oakland Circuit Court
LC No. 2005-067556-CH

MAJIC FUNDING, L.L.C.,

Defendant-Appellee,

and

DOUGLAS & DAUGHTERS CORPORATION,
FRANK SHUSHTARI, and GABRIEL LIMA,

Defendants/Counter-
Plaintiffs/Appellees,

and

MELISSA J. WHITSETT and MARK A.
WHITSETT,

Defendants.

Before: Whitbeck, P.J., and O'Connell and Kelly, JJ.

PER CURIAM.

In this case involving competing claims regarding the priority of mortgages, plaintiff Mortgage Electronic Registration Systems, Inc. (MERS), as nominee for Quicken Loans, Inc., appeals as of right from the trial court's order granting summary disposition in favor of defendants Douglas & Daughters Corporation, Frank Shushtari, and Gabriel Lima (collectively, Douglas), pursuant to MCR 2.116(C)(10). We affirm.

I. Basic Facts And Procedural History

This action involves a dispute over the priority of competing mortgages and MERS's request for relief from a foreclosure sale. The mortgages at issue involve residential property formerly owned by defendants Mark and Melissa Whitsett. On September 18, 2002, the

Whitsetts entered into a mortgage agreement with defendant Majic Funding, L.L.C., for \$5,845, to secure financing for the purchase of new windows. On December 2, 2002, before the Majic mortgage was recorded, the Whitsetts refinanced their home and entered into a separate mortgage agreement with MERS for \$190,000, the proceeds of which were used to pay off an original first-lien mortgage, which predated the Majic mortgage, with a different lender. The Majic mortgage was later recorded on March 6, 2003, and the MERS mortgage was recorded on March 13, 2003. In terms of recording, the Majic mortgage therefore had priority over the MERS mortgage

The Whitsetts defaulted on both loans, and Majic foreclosed on the property by advertisement. On February 8, 2005, Douglas purchased the property at a sheriff's sale for \$7,040.15. The sheriff's deed was recorded on February 15, 2005. MERS subsequently filed this lawsuit on July 6, 2005. This was before the foreclosure redemption period expired on August 8, 2005, and the property was never redeemed. MERS's first amended complaint requested relief from the foreclosure sale on the basis of an alleged defect in the sheriff's deed. MERS also sought a determination that its mortgage had priority over the Majic mortgage under the doctrine of equitable subrogation. The trial court granted Douglas's motion for summary disposition under MCR 2.116(C)(10).

II. Summary Disposition

A. Standard of Review

“We review de novo a trial court's decision to grant or deny summary disposition.”¹ A motion under MCR 2.116(C)(10) tests the factual support for a claim.² The trial court must consider any pleadings, affidavits, depositions, admissions, or other documentary evidence filed by the parties in a light most favorable to the nonmoving party to determine whether a genuine issue of fact exists.³ The trial court should grant the motion “if the evidence demonstrates that no genuine issue of material fact exists and that the moving party is entitled to judgment as a matter of law.”⁴ We also de novo review equitable actions to quiet title.⁵

B. Equitable Subrogation

(1) MCL 565.25(4)

Initially, there is no merit to MERS's argument that MCL 565.25(4) is not applicable to this case. “Michigan is a recording priority jurisdiction.”⁶ Under MCL 565.25(4), once a

¹ *MacDonald v PKT, Inc*, 464 Mich 322, 332; 628 NW2d 33 (2001).

² *Id.*

³ MCR 2.116(G)(2); *Ritchie-Gamester v City of Berkley*, 461 Mich 73, 76; 597 NW2d 517 (1999).

⁴ *MacDonald, supra* at 332.

⁵ *Ameriquest Mortgage Co v Alton*, 273 Mich App 84, 92; 731 NW2d 99 (2006).

⁶ *Id.* at 93.

mortgage is recorded, “[a]ll subsequent owners or encumbrances shall take subject to the perfected liens, rights, or interests.” As this Court stated in *Ameriquist Mortgage Co v Alton*, this statute “serves to determine lien priority” and, under the statutory language, “[m]ortgages are subjected to the satisfaction of the obligation on the mortgage note in the order in which they are recorded.”⁷ It is undisputed that the Majic mortgage was recorded before the MERS mortgage. Therefore, the Majic mortgage has priority under MCL 565.25(4).

(2) The Application Of Equitable Subrogation

Despite the mandate of this statute, MERS argues that its mortgage should be given priority over the Majic mortgage under the doctrine of equitable subrogation. We disagree.

In *Ameriquist*, a special panel of this Court considered the applicability of this doctrine and held that MCL 565.25 governs mortgage priority disputes, except in limited circumstances where a party may seek equitable subrogation based on fraud, mutual mistake, or other unusual circumstances. This Court observed that courts have defined equitable subrogation as “a legal fiction through which a person who pays a debt for which another is primarily responsible is substituted or subrogated to all the rights and remedies of the other.”⁸ The Court held that “[i]n order to be entitled to subrogation, a subrogee cannot voluntarily have made payment, but rather must have done so in order to fulfill a legal or equitable duty owed to the subrogor.”⁹

Contrary to MERS’s argument, here, the evidence established that MERS was a “mere volunteer” to the mortgage transaction. MERS did not have a prior relationship with the Whitsetts or a preexisting interest in the Whitsetts’ property that it was attempting to protect. Further, MERS had no duty, legal or equitable, to provide a mortgage loan. The mere fact that the Whitsetts requested refinancing with MERS did not obligate it to undertake such refinancing. Although MERS applied the mortgage proceeds to pay off the original first-lien mortgage, this did not entitle it to equitable subrogation. As this Court observed in *Ameriquist*:

Very early on, the Michigan Supreme Court opined that payment of a debt by a third party, standing alone, “could hardly constitute an interest in the real estate; the right of a mere volunteer, showing no interest in the land, to pay off the mortgage, could hardly be deemed a valuable right.”^[10]

Clearly, the transaction here was a generic refinancing transaction. In such a context, the *Ameriquist* Court quoted approvingly from *Washington Mut Bank, FA v Shorebank Corp*:

“[W]e 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

⁷ *Id.* at 93-94, quoting *Mitchell v United States Mut Real Estate Investment Trust*, 144 Mich App 302, 314; 375 NW2d 424 (1985) (alteration by *Ameriquist Mortgage Co*).

⁸ *Id.* at 94 (citations omitted).

⁹ *Id.* at 95.

¹⁰ *Id.* at 96, quoting *Smith v Austin*, 9 Mich 465, 482 (1862).

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.”¹¹

There was no evidence in this case that the MERS mortgage was given to preserve the Whitsetts’ property from foreclosure or to protect the security interests of any other lienholder.

MERS suggests that equity favors that it be subrogated to the rights of the original mortgagee because, as a result of Majic’s failure to record its mortgage, MERS did not have notice of the intervening mortgage. The question of notice is irrelevant to whether MERS had a legal or equitable duty to refinance the Whitsetts’ prior mortgage. Further, it was not MERS’s lack of notice of the Majic mortgage that affected its priority position. Because the Majic mortgage had not been recorded before the MERS mortgage was given, MERS’s mortgage would have had priority *if it had been recorded first*. Instead, MERS delayed recording its mortgage for more than three months. Ultimately, the Majic mortgage was recorded approximately a week before MERS recorded its mortgage. As this Court stated in *Ameriquest*, “a ‘mere volunteer’ has consistently been precluded from invoking the doctrine [of equitable subrogation] to attain a more favorable position of priority than afforded by the order in which the instrument or mortgage was recorded.”¹²

MERS also asserts that equitable subrogation is appropriate in this case because of fraud. It asserts that Melissa Whitsett engaged in fraud when she signed a statement falsely indicating that she had not had any home improvements done during the four months preceding the date of the MERS mortgage. In *Ameriquest*, this Court stated that “[i]t is only to prevent fraud and subserve justice that equity engrafts the wholesome provisions of subrogation or of equitable lien upon a transaction.”¹³ However, the Court concluded that an allegation of fraud by the property owner for falsely stating that there were no other liens on the property, did not support the application of the doctrine of equitable subrogation where there were no allegations of wrongdoing on the part of the competing lienholder.

Here, MERS does not allege any fraudulent conduct by either Majic or Douglas in an attempt to unjustly deprive the MERS mortgage of its priority status. Although MERS complains that it did not have notice of the Majic mortgage because it had not been recorded, that did not prevent MERS from promptly recording its mortgage, thereby giving it priority under MCL 565.25(4). Similarly, any representation by Melissa Whitsett did not prevent MERS from obtaining a priority position simply by recording its mortgage first. Instead, it was MERS’s

¹¹ *Id.* at 97, quoting *Washington Mut Bank, FA v Shorebank Corp*, 267 Mich App 111, 128; 703 NW2d 486 (2005) (alteration by *Ameriquest Mortgage Co*).

¹² *Id.* at 96.

¹³ *Id.* at 98, quoting *Kelly v Kelly*, 54 Mich 30, 47; 19 NW 580 (1884) (alteration by *Ameriquest Mortgage Co*).

delay in recording its mortgage for more than three months that affected its priority position. As in *Ameriquest*, MERS is not entitled to equitable subrogation on the basis of fraud.

MERS also suggests that equitable subrogation is appropriate because of a mutual mistake. In *Ameriquest*, this Court recognized that equitable subrogation may be appropriate in unusual circumstances involving mutual mistake.¹⁴ In this case, MERS acknowledges that a mistake supporting application of equitable subrogation must be mutual and bases its claim of mistake on its failure to discover the Majic mortgage. It argues that this mistake was mutual because it was caused by Majic's failure to record its mortgage in a timely fashion. We disagree.

First, MERS's belief that no other liens had been given, or that its mortgage would have first priority, was not mutual, because Majic did not share that belief. Second, as previously indicated, it was not Majic's failure to timely record its mortgage that prevented the MERS mortgage from being first in priority. Upon discovering that there were no other recorded liens on the property as of the date its mortgage was given, MERS was entitled to assume that its mortgage would be first in priority under MCL 565.25(4), if recorded before any other encumbrances were recorded. Instead, MERS lost its priority status because it delayed recording its mortgage for more than three months, not because of a mutual mistake.

Finally, MERS suggests that equitable subrogation should apply because Douglas received an "unearned windfall." This basis for subrogation was rejected in *Ameriquest* where this Court reasoned that a court's equitable power has traditionally been reserved for unusual circumstances such as fraud or mutual mistake, and that courts are not free to ignore the statutory mandate in MCL 565.25(4).¹⁵ The Court concluded that because MCL 565.25(4) plainly provides for priority designation based on date of recordation and the plaintiff did not establish fraud, mutual mistake, or any other unusual circumstance in reference to the competing lienholder, there was no basis for invoking other equitable powers.¹⁶ In this case, because MCL 565.25(4) plainly governs the priority of the competing mortgages and because MERS has not shown any fraud, mutual mistake, or other unusual circumstance justifying relief relating to Majic, any alleged windfall resulting from the Majic mortgage does not entitle MERS to equitable subrogation.

In sum, we conclude that MCL 565.25(4) establishes the priority of the Majic mortgage over the MERS mortgage, because the Majic mortgage was recorded first and because MERS has not established any circumstances justifying application of the doctrine of equitable subrogation.

C. The Sheriff's Deed

MERS argues that it was entitled to summary disposition on its claim to set aside the foreclosure sale because of a defect in the legal description of the property in the sheriff's deed. We disagree.

¹⁴ *Id.* at 95, 99.

¹⁵ *Id.* at 98-99.

¹⁶ *Id.* at 99-100.

The submitted evidence indicated that when the sheriff's deed was prepared, the preparer initially typed the lot number for the property as "268" instead of the correct number "260," and that the preparer then corrected this mistake with an overstrike, by typing a zero over the eight.

For a foreclosure notice to be valid, "[t]he property to be sold must be described in the notice with such a reasonable degree of certainty that the public by the exercise of ordinary intelligence may be enabled to identify it, and may be directed to the means of obtaining an exact description if desired."¹⁷ When the description in a deed contains both "false and impossible parts," the false information should be "rejected, where, by so doing a good description remains."¹⁸ The rejection of the false information "does not render the deed void" where the description is sufficiently certain.¹⁹ Instead, "the entire description in the deed must be taken and the identity of the land ascertained by a reasonable construction of the language used; and, if there be a repugnant call which, by the other calls in the deed, clearly appears to have been made through mistake, that does not make void the deed."²⁰

Here, although there was a typographical error on the lot number in the legal description on the sheriff's deed, the remainder of the description correctly identified the property by location, tax number, and common address. The submitted evidence indicated that the description on the deed was sufficient to enable Douglas to be identified as the owner of the property in public records, where it was so identified, by the correct tax identification number and common address of the property. As the trial court concluded, the description was sufficiently certain to identify the property.

D. Unresolved Issues Of Fact

MERS argues that there are unresolved factual issues that should have precluded summary disposition in favor of defendants. We disagree.

As explained previously, the priority of the competing mortgages was governed not by whether MERS had actual notice of the Majic mortgage but by the order in which the mortgages were recorded. The trial court addressed the adequacy of the description in the sheriff's deed and determined that any defect in the reference to the lot number did not render it defective. As explained in section C above, the trial court did not err in this determination. MERS does not explain the relevancy of Melissa Whitsett's alleged conversation with an unidentified Household representative and the trial court did not find that the conversation was relevant to its decision. Additionally, on appeal, MERS has not established the materiality of any factual issues related to that conversation. Because the factual issues identified by MERS were not material to whether Douglas was entitled to judgment as a matter of law, they did not preclude summary disposition under MCR 2.116(C)(10).

¹⁷ *Guardian Depositors Corp v Keller*, 286 Mich 403, 413; 282 NW 194 (1938) (internal quotations and citations omitted).

¹⁸ *Tuthill v Katz*, 163 Mich 618, 625; 128 NW 757 (1910).

¹⁹ *Id.*

²⁰ *Savidge v Seager*, 175 Mich 47, 60; 140 NW 951 (1913).

III. Extension of the Redemption Period

A. Standard Of Review

MERS argues that the trial court should have extended the redemption period. MERS first raised this issue below in its motion for reconsideration. We review for an abuse of discretion a trial court's decision on a motion for reconsideration.²¹

B. Showing Of Irregularity

As MERS acknowledges, even in cases of hardship, courts cannot extend a statutory redemption period absent a clear showing of fraud, mistake, or irregularity.²² As previously discussed, MERS has not identified any fraud or mistake. Further, the alleged defect in the property description did not prevent a member of the public, by the exercise of ordinary intelligence, from ascertaining Douglas's interest in the property pursuant to the sheriff's deed. Because there was no showing of any defect or circumstance that would merit extension of the redemption period, the trial court did not abuse its discretion in denying MERS's motion for reconsideration.

IV. Request to Amend

A. Standard Of Review

MERS argues that the trial court erred in denying its unspecified request to amend its complaint. We review for an abuse of discretion a trial court's decision on a motion to amend a pleading.²³

B. Legal Standards

The rules governing the amendment of pleadings are intended to facilitate amendment except when prejudice to the opposing party would result. Thus, amendment is generally a matter of right, rather than grace. Ordinarily, a motion to amend a complaint should be granted, and should be denied only for one of the following particularized reasons: (1) undue delay, (2) bad faith or dilatory motive on the part of the movant, (3) repeated failure to cure deficiencies by amendments previously allowed, (4) undue prejudice to the opposing party by virtue of allowance of the amendment, or (5) futility of the amendment.^[24]

²¹ *Woods v SLB Prop Mgt, LLC*, 277 Mich App 622, 629; ___ NW2d ___ (2008).

²² *Detroit Trust Co v George*, 262 Mich 362, 364; 247 NW 697 (1933); *Schulthies v Barron*, 16 Mich App 246, 247-248; 167 NW2d 784 (1969).

²³ *Lane v KinderCare Learning Centers, Inc*, 231 Mich App 689, 696; 588 NW2d 715 (1998).

²⁴ *Id.* at 697 (citations omitted).

C. Applying The Standards

In this case, MERS asked that it be allowed to amend its complaint to ensure that “all applicable claims are before the Court,” but did not specify any particular additional claims or allegations that it sought to advance. MERS now argues that it should be allowed to amend its complaint to assert a claim for extension of the redemption period and to clarify its other claims for equitable relief. As discussed previously, however, MERS has not shown that it was entitled to either extension of the redemption period or other equitable relief. Under the circumstances, the trial court did not abuse its discretion in denying MERS’s unspecified request.

Affirmed.

/s/ William C. Whitbeck
/s/ Peter D. O’Connell
/s/ Kirsten Frank Kelly