# STATE OF MICHIGAN

# COURT OF APPEALS

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| WASHINGTON MUTUAL BANK,<br><br>Plaintiff-Appellant, | UNPUBLISHED<br>October 20, 2009 |
| v | No. 285573<br>Genesee Circuit Court |
| JP MORGAN CHASE BANK,<br><br>Defendant-Appellee. | LC No. 04-079333-CZ |

Before: Saad, C.J., and O'Connell, and Zahra, JJ.

PER CURIAM.

Plaintiff is an assignee of a mortgage interest in property that was initially obtained by Long Beach Mortgage Company as security for a loan. Defendant is an indenture trustee[1] with respect to a mortgage interest in the property that was originally obtained by Home American Credit, Inc., d/b/a Upland Mortgage, to secure a loan. Although the Upland mortgage was executed first, it was not recorded until after the Long Beach mortgage was recorded. Plaintiff filed this declaratory action to determine which mortgage interest has priority. The trial court, based in part on a summary disposition ruling and in part on findings rendered on briefs in lieu of a trial, entered an order and final judgment declaring that defendant has the superior mortgage interest in the property. Plaintiff appeals this judgment and, for the reasons set forth in this opinion, we affirm.[2]

A court may declare the rights and other legal relations of an interested party in a declaratory judgment action. MCR 2.605(A)(1); *Farm Bureau Ins Co v Abalos*, 277 Mich App

[1] An indenture trustee is "[a] trustee named in a trust indenture and charged with holding legal title to the trust property; a trustee under an indenture." Black's Law Dictionary, (8th ed, 2004).

[2] We decline to consider plaintiff's argument that defendant does not have a valid affirmative defense based on equitable subrogation, because that issue was neither ruled upon by the trial court nor pursued by defendant. We also decline to consider plaintiff's argument that defendant was not entitled to relief because of unclean hands, because this issue is insufficiently briefed. *Peterson Novelties, Inc v City of Berkley*, 259 Mich App 1, 14; 672 NW2d 351 (2003).

41, 43; 742 NW2d 624 (2007). Underlying the parties' dispute is the so-called race-notice statute, MCL 565.29, which provides:

> 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. The fact that such first recorded conveyance is in the form or contains the terms of a deed of quit-claim and release shall not affect the question of good faith of such subsequent purchaser, or be of itself notice to him of any unrecorded conveyance of the same real estate or any part thereof.

There is no dispute that a mortgage constitutes a "conveyance" under this statute, or that Long Beach qualified as a "subsequent purchaser" by acquiring a mortgage from the property owner after the Upland mortgage was executed. The material question is whether Long Beach[3] acted in good faith and, therefore, can take advantage of the statute. This question, in turn, depends on whether Long Beach had notice of the Upland mortgage. *Richards v Tibaldi*, 272 Mich App 522, 539; 726 NW2d 770 (2006).

Notice can be actual or constructive. *Id.* at 539. It may take on the form of inquiry notice where "a person has knowledge of such facts as would lead any honest man, using ordinary caution, to make further inquiries concerning the possible rights of another in real estate." *Kastle v Clemons*, 330 Mich 28, 31; 46 NW2d 450 (1951). Oral statements, physical characteristics of the property, documentary materials, or even a combination of facts, may be sufficient to trigger an inquiry. See *id*. at 30-31; *Royce v Duthler*, 209 Mich App 682; 531 NW2d 817 (1985); *Lakeside Assoc v Toski Sands*, 131 Mich App 292; 346 NW2d 92 (1983). "Notice is whatever is sufficient to direct attention of the purchaser of realty to prior rights or equities of a third party and to enable him to ascertain their nature by inquiry." *Royce*, *supra* at 690, quoting *Schepke v Dep't of Natural Resources*, 186 Mich App 532, 535; 464 NW2d 713 (1990).

As part of its summary disposition ruling, the trial court held that Long Beach had inquiry notice.[4] Here, the mortgage interest acquired by Upland was not capable of being discovered by

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[3] Although we recognize that an assignee stands in the same position as its assignor, *Burkhardt v Bailey*, 260 Mich App 636, 652-653; 680 NW2d 453 (2004), considering that the proper resolution of this case depends on Long Beach's actions, we shall refer to the mortgagee in this case as Long Beach, and not plaintiff.

[4] We review a trial court's summary disposition decision de novo. *Farm Bureau Ins Co, supra* at 43. Because the trial court considered evidence beyond the pleadings, we review the decision under MCR 2.116(C)(10). A motion under MCR 2.116(C)(10) tests the factual support for a claim. *Healing Place at North Oakland Medical Ctr v Allstate Ins Co*, 277 Mich App 51, 55-56; 744 NW2d 174 (2007). A motion under this subrule should be granted if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Id.* at 56. "A genuine issue of material fact exists when the record, drawing all reasonable inferences in favor of the nonmoving party, leaves open an issue upon which reasonable minds could differ." *Id.*

a physical inspection of the property. Also, there is no evidence of any oral statements that might have alerted Long Beach to the possibility of an unrecorded mortgage interest on the property. There was, however, uncontested evidence that Long Beach had knowledge of a number of documents. Specifically, Long Beach received the property owner's loan application indicating that she owned no other property. The loan application also contained expense information for a "first mortgage" and identified the purpose of the mortgage loan as "refinance," but did not list the Upland mortgage in the liabilities section of the application. The property owner also executed a "closing affidavit," which represented that there were no outstanding mortgages or liens. A title commitment obtained by Long Beach from an insurance agency did not reveal any recorded mortgage, but did require a "Satisfactory Affidavit of No Liens."

Considering these documents in combination with the credit report acquired by Long Beach, which contained information about the Upland mortgage, reasonable minds could not differ in concluding that an ordinary, honest person would have been prompted to make an inquiry, before completing the loan transaction, into whether an unrecorded mortgage loan existed that the property owner failed to disclose. The trial court did not err in finding that there was no genuine issue of material fact that Long Beach had a duty to make further inquiry.

Because the facts were sufficient to put Long Beach on inquiry notice, it had a duty to exercise due diligence in making an inquiry. *American Federal S & L Ass'n v Orenstein*, 81 Mich App 249, 252; 265 NW2d 111 (1978). As explained in *Colonial Theatrical Enterprises v Sage*, 255 Mich 160, 167-168; 237 NW 529 (1931), quoting 27 RCL, p 712:

> "All that is required of a party who is put upon inquiry is good faith and reasonable care in following up the inquiry which the notice given him suggests. If due and diligent inquiry is made and notwithstanding it no knowledge of the outstanding equity is acquired, the purchaser will have performed his full duty and will not be charged with further notice. But the inquiry in such a case must be made at a reliable source from which the true state of facts will be naturally disclosed."

See also *Federman v Van Antwerp*, 276 Mich 344, 347; 267 NW 856 (1936).

The trial court's finding that Long Beach did not make a sufficient inquiry was based on the parties' briefs, in lieu of conducting a trial, pursuant to the parties' stipulation. We review a trial court's findings of fact for clear error and its conclusions of law de novo. *Ligon v Detroit*, 276 Mich App 120, 124; 739 NW2d 900 (2007); see also MCR 2.613(C). "A finding is clearly erroneous when, although there is evidence to support it, the reviewing court on the entire record is left with the definite and firm conviction that a mistake has been committed." *Walters v Snyder*, 239 Mich App 453, 456; 608 NW2d 97 (2000).

We reject plaintiff's argument that Long Beach made a sufficient inquiry by obtaining the "closing affidavit" from the property owner and a title commitment from the insurance agency, which indicated that there was no recorded mortgage. The most that can be said from this documentary evidence is that Long Beach had the property owner execute a "closing affidavit" containing standard boilerplate language as part of its normal practice of completing a loan transaction. There is no evidence that a specific inquiry was made to the property owner

regarding the information in the credit report. Even if the property owner had been confronted with the information in the credit report, and she denied any existing mortgage with Upland, her reliability would be suspect because she was the party attempting to procure a loan to be secured by her only known real property. An obvious inquiry would have been to attempt to use the information in the credit report to contact its source to determine whether the information was accurate. Because there is no evidence that Long Beach did so, the trial court did not clearly err when it found that Long Beach did not make a sufficient inquiry. Therefore, we affirm the court's declaratory ruling that defendant's mortgage interest has priority.

Affirmed.

/s/ Henry William Saad
/s/ Peter D. O'Connell
/s/ Brian K. Zahra