

STATE OF MICHIGAN
COURT OF APPEALS

SWANY CONSTRUCTION, INC.,

Plaintiff-Counterdefendant-
Appellee,

v

DEUTSCHE BANK TRUST COMPANY
AMERICAS,

Defendant-Counterplaintiff-
Appellant.

UNPUBLISHED
March 15, 2011

No. 295761
Macomb Circuit Court
LC No. 2009-000721-CH

Before: MURPHY, C.J., and STEPHENS and M.J. KELLY, JJ.

PER CURIAM.

In this action involving a claim and counterclaim to quiet title to real property, along with competing motions for summary disposition, defendant appeals as of right the trial court's order granting summary disposition in favor of plaintiff. We affirm.

In this case, Bradley and Brianna Houston previously owned the residential property at issue, which was damaged in a fire in 2005. First Franklin Financial Corporation had held a mortgage on the property, but it assigned the mortgage to Wells Fargo Bank prior to the fire. Plaintiff performed construction repair and restoration work relative to the damages caused by the fire, along with some remodeling unrelated to the fire. Plaintiff recorded a construction lien at the end of the project. The legal description in the claim of lien identified the property's actual address, the property's parcel number, and it indicated that the property encompassed two lots in a named subdivision plat, as recorded in particular liber and page numbers. However, the liber and page numbers listed were not actually for the subdivision plat, but were instead for the Houstons' warranty deed.

The Houstons failed to pay plaintiff for its construction services, and plaintiff filed a complaint to foreclose on the construction lien. During the pendency of the foreclosure action, and unbeknownst to plaintiff, Mrs. Houston filed for bankruptcy protection and the Houstons

refinanced the home with a loan from New Century Mortgage Company. This gave New Century a mortgage that was of course recorded after the first physical improvements were made to the property by plaintiff and after the construction lien had been recorded.¹ Most of the funds from the new loan were used to satisfy the mortgage held by Wells Fargo, which mortgage, now released, had been recorded prior to the first physical improvements and the recording of the construction lien, giving that mortgage priority over the construction lien until it was extinguished.² No refinancing proceeds obtained by the Houstons were paid to plaintiff. Plaintiff proceeded with the foreclosure action and obtained a default judgment.³ After entry of the foreclosure judgment, plaintiff notified New Century of the judgment, informing it that New Century's interest was secondary to plaintiff's interest and that New Century could, if it desired to do so, protect its interest by purchasing the judgment from plaintiff. New Century did not take any steps in response to the notification, and plaintiff then purchased the property at a foreclosure sale pursuant to a clerk's deed for the amount owing on the construction debt and costs. The clerk's deed also reflected the incorrect legal description. Thereafter, on plaintiff's motion, the circuit court entered an order in the foreclosure action confirming the sale at auction. This order provided that "the [m]otion and supporting affidavits were read and the statements of counsel were heard from which it satisfactorily appears that the procedural and statutory demands have been fully complied with[.]"

Eight months later, New Century assigned its supposed mortgage interest to defendant, which led to the competing quiet title claims in the case at bar. Defendant's arguments as to why title should be quieted in its favor were predicated on defects in the legal description and challenges to the validity of the underlying construction lien and the foreclosure process. Defendant contended that plaintiff failed to comply with various provisions found in the Michigan Construction Lien Act (CLA), MCL 570.1101 *et seq.* Defendant also maintained that the court should apply the doctrine of equitable subrogation, making defendant's interest superior to plaintiff's interest by way of defendant subrogating to the rights of New Century and then further subrogating to the rights of Wells Fargo. Plaintiff posited that defendant could not collaterally attack the foreclosure judgment, that collateral estoppel barred defendant's quiet title

¹ Accordingly, the construction lien had priority under MCL 570.1119(3), which provides that a "construction lien . . . shall take priority over all other interests, liens, or encumbrances which may attach to the building, structure, or improvement . . . when the other interests, liens, or encumbrances are recorded subsequent to the first actual physical improvement."

² "A mortgage, lien, encumbrance, or other interest recorded before the first actual physical improvement to real property shall have priority over a construction lien . . ." MCL 570.1119(4).

³ During the foreclosure proceedings, the Houstons and plaintiff reached an agreement pursuant to which the Houstons would pay plaintiff \$1,500 per month, but the Houstons failed to honor the agreement.

claim, that the legal description was sufficiently accurate such that a sound title search would have revealed the claim of lien, and that the equities weighed against defendant for purposes of equitable subrogation. On cross-motions for summary disposition, the trial court ruled that the prior foreclosure action necessarily resulted in a determination that plaintiff held a valid lien. The court concluded, therefore, that defendant could not collaterally attack the validity of the lien in the present action and that the doctrine of collateral estoppel barred defendant's claim. The trial court also rejected defendant's claim of equitable subrogation.

We review de novo a trial court's decision on a motion for summary disposition. *Allen v Bloomfield Hills School Dist*, 281 Mich App 49, 52; 760 NW2d 811 (2008). We initially find that defendant's quiet title counterclaim cannot be sustained because it constitutes a collateral attack on the foreclosure judgment and order confirming sale, which gave free and clear title to plaintiff. "The decision of a court having jurisdiction is final when not appealed and cannot be collaterally attacked." *SS Aircraft Co v Piper Aircraft Corp*, 159 Mich App 389, 393; 406 NW2d 304 (1987). Absent a lack of jurisdiction in an initial suit, the court's orders and judgments in the first suit cannot be collaterally attacked by bringing a second suit. *Id.* "[A] collateral attack occurs whenever a challenge is made to a judgment in any manner other than through a direct appeal." *People v Howard*, 212 Mich App 366, 369; 538 NW2d 44 (1995). "[O]nly jurisdictional defects appearing on the face of the judgment record can be attacked collaterally." *Life Ins Co of Detroit v Burton*, 306 Mich 81, 85; 10 NW2d 315 (1943) (citation omitted). A collateral attack is precisely what defendant here is attempting to accomplish with this suit.

The foreclosure default judgment provided that after the redemption period expired, the Houstons and all persons claiming from, through, or under the Houstons "are forever barred from all redemption rights and any and all claims to the property." The order confirming sale provided that all procedural and statutory requirements had been satisfied. Under MCL 570.1121(3), when a construction lien is the superior interest in the property in terms of priority, "the foreclosure, upon becoming final, shall vest in the grantee named in the deed [here plaintiff] all the right, title, and interest in the real property which the owner . . . whose interest is being foreclosed had at the date of the execution of the contract or at any time thereafter."⁴ Accordingly, under the CLA, on the finalization of the foreclosure process, title to the property was effectively quieted in plaintiff's favor. And there was no appeal of the foreclosure action. Moreover, the circuit court had jurisdiction over the construction lien foreclosure action. MCL 570.1118(1). Defendant did not make any attempt to intervene and reopen the foreclosure action, nor did New Century, defendant's predecessor in the mortgage interest, attempt to intervene despite knowledge of the foreclosure proceedings. Were defendant permitted to proceed with its quiet title claim and succeed, there would be two conflicting circuit court

⁴ Under the CLA, the "period of redemption shall not exceed 4 months," and a sale becomes "final, subject to the period of redemption, upon the entry of an order of confirmation by the court." MCL 570.1121(3). Here, the redemption period expired with no efforts by anyone to redeem the property or claim an interest.

opinions regarding title to the property. We note that we make no findings regarding whether plaintiff complied with the various provisions contained in the CLA, as it is unnecessary to do so.

To the extent that the doctrine of collateral attack has been subsumed by the doctrine of collateral estoppel, collateral estoppel also bars defendant's quiet title counterclaim. Summary disposition based on collateral estoppel is governed by MCR 2.116(C)(7). *Alcona Co v Wolverine Environmental Production, Inc*, 233 Mich App 238, 246; 590 NW2d 586 (1998). Under MCR 2.116(C)(7), the moving party may submit affidavits, depositions, admissions, or other documentary evidence in support of the motion if substantively admissible. *Odom v Wayne Co*, 482 Mich 459, 466; 760 NW2d 217 (2008). The contents of the complaint must be accepted as true unless contradicted by the documentary evidence. *Id.* This Court must consider the documentary evidence submitted for purposes of a motion brought under MCR 2.116(C)(7) in a light most favorable to the nonmoving party. *Herman v Detroit*, 261 Mich App 141, 143-144; 680 NW2d 71 (2004).

Collateral estoppel concerns issue preclusion and it bars the relitigation of a particular issue in a new action that arises between the same parties or their privies where the previous action resulted in a valid final judgment and the issue in dispute was actually and necessarily determined in the prior proceeding. *Moses v Dep't of Corrections*, 274 Mich App 481, 503; 736 NW2d 269 (2007); *Leahy v Orion Twp*, 269 Mich App 527, 530; 711 NW2d 438 (2006).

With respect to the issue whether collateral estoppel is applicable because the foreclosure judgment was a default judgment, Michigan law clearly provides that collateral estoppel applies to default judgments. *Rohe Scientific Corp v Nat'l Bank of Detroit*, 133 Mich App 462, 467; 350 NW2d 280 (1984); *DAIIE v Higginbotham*, 95 Mich App 213, 219; 290 NW2d 414 (1980); *Sahn v Brisson*, 43 Mich App 666, 670-671; 204 NW2d 692 (1972). The default judgment, however, is conclusive solely as to those matters essential to support the judgment. *Rohe*, 133 Mich App at 467; *Higginbotham*, 95 Mich App at 219. We also note that "a default judgment is equivalent to an admission by the defaulting party to all of the matters well pleaded." *Sahn*, 43 Mich App at 671; see also *Kalamazoo Oil Co v Boerman*, 242 Mich App 75, 78-79; 618 NW2d 66 (2000).

Pursuant to MCL 570.1121(1), a circuit court may enter a foreclosure judgment and order a sale of real property to which a construction lien attached "[i]f the court finds that a lien claimant is entitled to a construction lien upon the real property." Entitlement to a construction lien would require "substantial compliance with the provisions" of the CLA. MCL 570.1302(1). Accordingly, a matter essential to support the foreclosure default judgment included plaintiff being in substantial compliance with the CLA. "Substantial compliance with the provisions of [the CLA] . . . shall be sufficient for the validity of the construction liens provided for in this act, and to give jurisdiction to the court to enforce them." Therefore, necessarily encompassed within the default judgment was a finding of substantial compliance with the CLA, which in turn accorded validity to the construction lien recorded by plaintiff. Further, the foreclosure default judgment expressly included a determination that the Houstons' rights in the property, along with all others claiming from, through, or under the Houstons, were forever barred. Moreover, the order confirming sale expressly indicated that the "procedural and statutory demands" had been satisfied. Thus, the issues that defendant now wishes to dispute were actually and necessarily

determined in the prior proceeding, thereby implicating the doctrine of collateral estoppel. *Moses*, 274 Mich App at 503.

Although defendant was not a party to the foreclosure action, which was an impossibility given that it did not acquire its interest until after the foreclosure proceedings were finalized, we find that it was a privy of New Century and the Houstons. “A privy includes one who, after rendition of the judgment, has acquired an interest in the subject matter affected by the judgment through one of the parties, as by inheritance, succession, or purchase.” *Peterson Novelties, Inc v City of Berkley*, 259 Mich App 1, 13; 672 NW2d 351 (2003), citing *Wildfong v Fireman’s Fund Ins Co*, 181 Mich App 110, 115; 448 NW2d 722 (1989). Defendant, which acquired its interest in the property after rendition of the foreclosure judgment and order confirming sale, as well as after expiration of the redemption period, was a privy of New Century, having been assigned the mortgage interest by New Century. Defendant and New Century had a substantial identity of interests and a working relationship. *Peterson*, 259 Mich App at 13. We recognize that New Century was not one of the parties to the foreclosure action, but when plaintiff initiated the foreclosure action, New Century had not yet acquired its interest⁵ and the Houstons did not inform plaintiff of the refinancing. After New Century’s interest was discovered, plaintiff notified New Century of the foreclosure proceedings; however, New Century took no action to intervene and raise challenges. New Century, having been made aware of the foreclosure action and judgment, proceeded to eventually assign its mortgage interest to defendant, apparently failing to disclose to defendant the existence of the foreclosure. Additionally, the Houstons subjected their interest in the property to a mortgage given to New Century, which then assigned that interest to defendant. Therefore, we conclude that defendant was a privy of New Century and the Houstons, and the Houstons were a party to the foreclosure action.

With respect to equitable subrogation, we conclude that this case does not present one that involves fraud, mutual mistake, or unusual circumstances to the extent that there is a basis to invoke equitable powers; rather, the relevant priority statutes apply. *Ameriquist Mortgage Co v Alton*, 273 Mich App 84, 98-100; 731 NW2d 99 (2006). In *Washington Mut Bank, FA v ShoreBank Corp*, 267 Mich App 111, 128; 703 NW2d 486 (2005), this Court observed:

[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 priority of the original mortgage, which is being paid off, giving it priority over intervening liens.

The arrangement between New Century and the Houstons constituted a generic refinancing transaction. Therefore, the mortgage held by New Century did not take the position of priority held by the Wells Fargo mortgage and thus defendant’s mortgage cannot subrogate to

⁵ Plaintiff was only required to name as a party those persons who had an interest in the property at the time the action was filed. MCL 570.1117(4).

the priority position held by the Wells Fargo mortgage by way of the assignment between New Century and defendant.

Furthermore, we cannot find that the equities favor defendant under the circumstances of this case; at most, plaintiff and defendant have equal equities and therefore equitable subrogation cannot be enforced. *Alton*, 273 Mich App at 95. With respect to equity, defendant claims that it had no knowledge of the construction lien and resulting foreclosure because of the error in the legal description. First, as far as blameworthiness, New Century's actions would appear to be more egregious than anything done by plaintiff. Additionally, plaintiff submitted an affidavit by an individual who had conducted title searches for over 20 years. The affiant averred that "it is the standard procedure in the title insurance industry to conduct a name search of the owner of property to be insured in order to verify that there are no judgment liens, tax liens, or other encumbrances upon the property." He further averred that liens such as judgment and tax liens do not contain legal descriptions, "but encumber the property owner's real estate." Plaintiff also submitted title searches revealing the construction lien. The affidavit relied on by defendant is of little value because it is vague and indefinite. The affidavit merely indicates that construction liens are "*generally* searched by legal description," that a title search of property based on an incorrect legal description "*may not* disclose . . . a construction lien," and that a mistaken liber and page number "*could* cause a construction lien to be missed." (Emphasis added.) Moreover, defendant's arguments beg the question why defendant would only have been looking for a construction lien in a title search before agreeing to the assignment instead of doing a general search for any encumbrances. On de novo review, *Blackhawk Dev Corp v Village of Dexter*, 473 Mich 33, 40; 700 NW2d 364 (2005), the equities do not weigh in favor of defendant.

Affirmed.

/s/ William B. Murphy
/s/ Cynthia Diane Stephens
/s/ Michael J. Kelly