STATE OF MICHIGAN

COURT OF APPEALS

RICHARD ROGOW and RICKI ROGOW,

Plaintiffs/Counter-Defendants-Appellees,

v

COMERICA BANK,

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

v

HOMECOMINGS FINANCIAL NETWORK, INC.,

Third-Party Defendant-Appellant,

and

ROGO, INC., d/b/a BIG DADDY'S PARTHENON TTG, INC., d/b/a BIG DADDY'S PARTHENON TTGP, INC., BIG DADDY'S PARTHENON, SAILING SHIP, INC., HOWARD BABCOCK, ANDREW C. JACOB, LINDEN NELSON, ANTHANASIOS PERISTERIS, ROBERT S. SILVERSTEIN TRUST, ROBERT S. SILVERSTEIN, and JACK B. WOLFE,

Third-Party Defendants.

UNPUBLISHED
March 1, 2007

No. 266430
Oakland Circuit Court
LC No. 2003-046991-CK

Before: O'Connell, P.J., and Saad and Talbot, JJ.

PER CURIAM.

Third-party defendant Homecomings Financial Network, Inc. (HFN) appeals the trial court's order that granted partial summary disposition to third-party plaintiff Comerica Bank under MCR 2.116(C)(10). We affirm.

I. Facts

On August 27, 1999, plaintiffs Richard and Ricki Rogow acquired a condominium known as the Maple Creek condo in West Bloomfield. The warranty deed was recorded on November 5, 1999 along with two mortgages through World Wide Financial Services, Inc. secured by promissory notes for $441,000 and $73,000. The $441,000 mortgage was later assigned to Residential Funding Corporation (RFC), and was recorded. The $73,000 mortgage was assigned to Countrywide Home Loans, Inc. and recorded on April 26, 2000. On November 19, 1999, the Rogows executed a continuing collateral mortgage with Comerica for the Maple Creek condo. The Rogows signed a promissory note for $400,000, and the mortgage was recorded on January 5, 2000.

In March 2001, Richard Rogow asked Angela Blust, a commercial loan officer at Comerica, to allow him to remortgage the Maple Creek condo. Rogow asked Comerica to release the Comerica mortgage and record a substitute mortgage after a newly executed mortgage was recorded. After obtaining committee approval, Blust told Rogow that Comerica would allow him to remortgage the two higher priority mortgages if the new mortgage did not exceed $516,000 in total and if Rogow provided Blust with a properly executed, recordable replacement mortgage. This subordination agreement was never reduced to writing and Rogow denied that one of the conditions was that the new mortgage not exceed $516,000.

On March 27, 2001, Blust received a facsimile from the Rogows' mortgage broker, Real Financial Services, L.L.C. that contained a title policy commitment from HFN's title agent, American Title of Michigan (ATM), and a proposed replacement mortgage against the Maple Creek condo. The proposed replacement mortgage was not notarized or witnessed. Further, the mortgage lists the mortgagor as 6199 Orchard Lake and the title commitment does not indicate the amount of the new mortgage. Blust asserted in her affidavit that she contacted ATM and told its agent that the proposed mortgage was defective. She also stated that she asked ATM for a complete copy of the title commitment showing the proposed amount of the new mortgage. Blust further maintained that she contacted Richard Rogow and told him that the proposed mortgage was unacceptable. However, Rogow stated in his affidavit that Blust never contacted him about the problems. Blust did not execute a recordable discharge of the Comerica mortgage.

On November 9, 2001, Rogow obtained a $650,000 mortgage loan from HFN for the Maple Creek condo. According to closing instructions, HFN was to have first lien priority. The majority of the loan proceeds were used to pay off the $437,510.58 RFC mortgage, a $176,812.32 Chase Manhattan mortgage, and the Countrywide mortgage of $69,832.05. Following the disbursements, a discharge of both the RFC and Countrywide mortgages was recorded. The $650,000 HFN mortgage was not recorded until October 4, 2002.

In September 2002, Comerica informed the Rogows of its intent to foreclose on the Maple Creek condo for failure to make payments. The Rogows filed a lawsuit against Comerica and sought injunctive relief to stop the foreclosure sale and specific performance of the purported subordination agreement. The Rogows and HFN challenged the validity of the Comerica mortgage and advanced a number of equitable arguments for relief. Comerica moved for partial summary disposition under MCR 2.116(C)(8) and (10) on the question of the validity of the Comerica mortgage against the Maple Creek condo. The trial court concluded that the mortgage was valid against the Rogows and granted partial summary disposition to Comerica.

Comerica also moved for partial summary disposition on the priority of its mortgage and foreclosure. After hearing oral argument, the trial court granted partial summary disposition to Comerica and concluded that Comerica had a first priority mortgage and was entitled to a judgment of foreclosure under MCL 600.3115. On September 29, 2005, the trial court entered money judgments against the Rogows and other third-party defendants, a conditional judgment of foreclosure, and a conditional deficiency judgment against the Rogows and other third-party defendants. After this Court dismissed HFN's initial appeal for lack of jurisdiction,[1] the trial court entered an order disposing of the parties' remaining claims, and this appeal followed.[2]

II. Analysis

HFN does not challenge the trial court's conclusion that the oral subordination agreement was unenforceable under the statute of frauds, which requires certain financial agreements to be in writing. MCL 566.132. Rather, HFN argues that the trial court erred when it decided the priority of the mortgages. HFN claims that the Comerica mortgage was not duly recorded under MCL 565.29 because the mortgage omitted certain required terms required under MCL 565.154. Accordingly, HFN argues that the Comerica mortgage was invalid.[3]

Michigan's race-notice statute, MCL 565.29, provides in relevant part as follows:

> 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 race-notice statute applies to mortgages. MCL 565.35; *Stover v Bryant & Detwiler Improvement Corp of Detroit*, 329 Mich 482, 484; 45 NW2d 364 (1951). Therefore, a recorded lien, right, and interest in property takes priority over subsequent owners and encumbrances. MCL 565.25(4). If someone fails to record an interest, that interest is void against any subsequent holder who records first and who bought the interest in good faith for valuable

---

[1] *Rogow v Comerica Bank*, unpublished order of the Court of Appeals, entered November 9, 2005 (Docket No. 265990).

[2] On October 15, 2005, Richard Rogow filed a voluntary petition under Chapter 11 of the United States Bankruptcy Code. On April 21, 2006, the US bankruptcy court lifted the automatic bankruptcy stay.

[3] A motion for summary disposition in a declaratory judgment action is reviewed de novo, *Citizens Ins Co v Pro-Seal Service Group, Inc*, 268 Mich App 542, 546; 710 NW2d 547 (2005), as is an equitable action to quiet title, *Burkhardt v Bailey*, 260 Mich App 636, 646-647; 680 NW2d 453 (2004). A motion for summary disposition under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004). Summary disposition should be granted under MCR 2.116(C)(10) if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Babula v Roberson*, 212 Mich App 45, 48; 536 NW2d 834 (1995).

consideration. MCL 565.29. A purchaser is deemed to have examined the record and to have notice of the contents of all instruments in the chain of title and of the contents of instruments referred to in an instrument in the chain of title. See *Boraks v Siegel*, 366 Mich 308, 311-312; 115 NW2d 126 (1962). A person who has notice of a possible defect but fails to make further inquiry into the possible rights of a third party is not a good-faith purchaser and is deemed to know what an inquiry would have disclosed. *Royce v Duthler*, 209 Mich App 682, 690; 531 NW2d 817 (1995). "The recordation of a mortgage constitutes constructive notice to all subsequent lien holders regarding both the existence of the mortgage and the amount of indebtedness that is secured." *Ameriquest Mortgage Co v Alton*, ___ Mich App ___; ___NW2d ___ (2006) (*Ameriquest II*), slip op pp 5-6, citing *McMurtry v Smith*, 320 Mich 304, 306-307; 30 NW2d 880 (1948).

Here, because Comerica indisputably recorded its mortgage on January 5, 2000, which was before HFN recorded its mortgage on October 4, 2002, HFN had constructive notice of the Comerica mortgage, regardless whether its title insurance commitment failed to reflect that recording. *Ameriquest II, supra* at slip op pp 5-6, citing MCL 565.25(4). Accordingly, HFN was not protected under the recording statute.

HFN also claims that an action concerning priority of mortgages amounts to a quiet title action and, therefore, the trial court erred by failing to consider its equitable claims. In *Devillers v Auto Club Ins Ass'n*, 473 Mich 562, 590; 702 NW2d 539 (2005), our Supreme Court ruled that a court may not apply equity to contravene a statutory provision that contains clear and unambiguous language, absent unusual circumstances, fraud, or mutual mistake. As discussed, MCL 565.25(4) clearly controls under the facts of this case. Nonetheless, the record reflects that the trial court did consider HFN's equitable claims, and determined that they are without merit. We agree with the trial court.

"In order to sustain the claim of unjust enrichment, plaintiff must establish (1) the receipt of a benefit by defendant from plaintiff, and (2) an inequity resulting to plaintiff because of the retention of the benefit by defendant." *Belle Isle Grill Corp v Detroit*, 256 Mich App 463, 478; 666 NW2d 271 (2003). Regardless whether a contract exists between two parties, a "person who has been unjustly enriched at the expense of another is required to make restitution to the other.'" *MEEMIC v Morris*, 460 Mich 180, 198; 596 NW2d 142 (1999) (citation omitted).

Initially, we disagree with the trial court when it found that Comerica did not benefit from the HFN remortgage. To the contrary, Comerica benefited from the HFN remortgage because the loan was used to discharge two higher priority liens (the RFC and Countrywide mortgages). *Washington Mut Bank, FA v ShoreBank Corp*, 267 Mich App 111, 127; 703 NW2d 486 (2005). However, HFN fails to articulate how it is inequitable for Comerica to retain its status as the higher priority lien because the mortgages were discharged with proceeds from the HFN loan. HFN claims that the Rogows' mortgage broker, Real Financial, understood that a release of the Comerica mortgage would be provided after the HFN loan was completed. Assuming HFN also understood this to be true prior to closing the loan, HFN should not have relied on a broker's apparent assertion that a subordination agreement had been reached without receiving the agreement in writing. Because HFN is a sophisticated lender, it should have known that, without a written subordination agreement, its mortgage would be junior to the Comerica mortgage given the applicable statute of frauds, MCL 566.132. Even if unaware, HFN is presumed to know the law, *Mudge v Macomb Co*, 458 Mich 87, 109 n 22; 580 NW2d 845

(1998), and cannot now claim a resulting inequity based on its own apparent mistake. Because HFN should not have relied, in lieu of a written document, on a mere assertion that a subordination agreement had been reached, we also reject HFN's claims based on the doctrines of equitable estoppel, constructive trust, and equitable lien.

HFN further argues that it should be given priority as a replacement mortgage of the RFC mortgage. This would allow HFN to retain priority over the Comerica mortgage, at least to the extent of the payoff amount of the RFC mortgage. HFN relies on a rule pronounced in *Schanhite v Plymouth United Savings Bank*, 277 Mich 33; 268 NW 801 (1936). In *Washington Mut Bank*, which is factually similar to this case, this Court concluded that application of the principles pronounced in *Schanhite* did not apply because the plaintiff was not the holder of the discharged mortgage and because the plaintiff had not purchased the discharged mortgage and then accepted a new mortgage. *Washington Mut Bank, supra* at 127. This Court further noted that there was no evidence to indicate that the plaintiff's mortgage was used to preserve its security interests as in *Schanhite*. *Id.*

Schanhite is inapplicable to this case because there is no evidence that HFN advanced funds to satisfy delinquent property taxes, and HFN, as the servicer of RFC loans, was not the holder of the RFC mortgage. In that regard, the trial court found that because HFN was not a holder of the RFC mortgage and because there were no compelling reasons to treat RFC and HFN, a wholly owned subsidiary of RFC, as single entity, HFN reliance on *Schanhite* was without merit.

It is well-settled that Michigan courts will respect the existence of separate entities. *Seasword v Hilti, Inc*, 449 Mich 542, 547-548; 537 NW2d 221 (1995); *Wells v Firestone Tire & Rubber Co*, 421 Mich 641, 650; 364 NW2d 670 (1984). There is no single set of factors that a court must analyze to determine whether the separate existence of a corporation should be disregarded. *Id.* This Court, however, has concluded that it may be appropriate to disregard such existence where (1) the corporate entity is a mere instrumentality of another individual or entity or individual, (2) the entity was used to commit a wrong or fraud, and (3) where there is an unjust loss or injury to the plaintiff. *Rymal v Baergen*, 262 Mich App 274, 293-294; 686 NW2d 241 (2004); *SCD Chem Distributors v Medley*, 203 Mich App 374, 381; 512 NW2d 86 (1994). Our Supreme Court has noted that fraudulent activity is unnecessary where a corporation exercises such control over the other that the dominating corporation should be held to be a principal of the other. *Herman v Mobile Homes Corp*, 317 Mich 233, 244-247; 26 NW2d 757 (1947).

Here, there is no compelling reason to treat HFN and RFC as one entity. There is no evidence to show that the separate existence of HFN was used to commit either a wrong or a fraud. And while RFC is apparently the parent corporation of HFN, there is no indication that it has the type of control over HFN's operations noted in *Herman*. Further, HFN's agreement with RFC to service RFC loans provides that HFN was to act as an independent contractor of RFC and must not represent that it is an agent of RFC. This agreement indicates that the entities desired to maintain their separate, corporate existence. While not always controlling, it is a strong indicator that the entities are separate.

HFN next relies on Restatement Property, Mortgages, 3d, § 7.3, pp 472-473, in arguing that a replacement mortgage may arise when a senior mortgage is replaced by a junior mortgage,

regardless whether there is any relation between the senior mortgagee and the junior mortgagee. HFN contends that its mortgage should have resulted in a replacement mortgage of both the RFC and Countywide mortgages that were discharged from the proceeds of the HFN loan.

Section 7.3 of the Restatement of Property, Mortgages, 3d, provides as follows:

> (a) One who fully performs an obligation of another, secured by a mortgage, becomes by subrogation the owner of the obligation and the mortgage to the extent necessary to prevent unjust enrichment. Even though the performance would otherwise discharge the obligation and the mortgage, they are preserved and the mortgage retains its priority in the hands of the subrogee.
>
> (b) By way of illustration, subrogation is appropriate to prevent unjust enrichment if the person seeking subrogation performs the obligation:
>
> (1) in order to protect his or her interest;
>
> (2) under a legal duty to do so;
>
> (3) on account of misrepresentation, mistake, duress, undue influence, deceit, or other similar imposition; or
>
> (4) upon a request from the obligor or the obligor's successor to do so, if the person performing was promised repayment and reasonably expected to receive a security interest in the real estate with the priority of the mortgage being discharged, and if subrogation will not materially prejudice the holders of intervening interests in the real estate.

The commentary to this section indicates that application of the rule is limited to the senior mortgagee executing a replacement mortgage. See Restatement of Property, Mortgages, 3d, § 7.3, comment a, p 474 ("This section aims at resolving those problems in a manner that protects the legitimate expectations of the holders of junior interests, while at the same time denying them the ability to veto workouts or other flexible restructuring arrangements *between mortgagors and senior lenders*." [emphasis added]), and comment b, p 474 ("*Under § 7.3(a) a senior mortgagee that discharges its mortgage of record and records a replacement mortgage does not lose its priority* as against the holder of an intervening interest unless that holder suffers material prejudice." [emphasis added]). Further, annotated case law indicates the same requirement. See, e.g., *Stephens Wholesale Bldg Supply Co, Inc v Birmingham Fed S & L Ass'n*, 585 So2d 870, 873 (Ala, 1991); *Bay Minette Production Credit Ass'n v Citizens' Bank*, 551 So2d 1046, 1047-1048 (Ala, 1989); *Home Fed S & L Ass'n v Citizens Bank of Jonesboro*, 43 Ark App 99, 100-102; 861 SW2d 321 (1993). Thus, it appears that the intent of the Restatement section is to protect, when appropriate, a senior mortgagee who executes a refinanced mortgage after a junior mortgage has been executed, which is not the case here.

HFN finally argues that the trial court erred in denying its claim for equitable subrogation. However, *Ameriquest II* renders this argument without merit.

In *Ameriquest II*, this Court concluded that the mere volunteer rule set forth in *Washington Mut Bank* was correct, reasoning that *Washington Mut Bank* "encompasses both the recognition of the controlling statutory mandate contained in MCL 565.25(4) and the acknowledged constraints pertaining to the use of equitable powers by courts." *Ameriquest II, supra* at slip op pp 8-9. Here, HFN was clearly a mere volunteer and therefore prevented from asserting a claim for equitable subrogation because HFN had no interest in the Maple Creek condo prior to executing its mortgage. Further, HFN is charged with constructive notice under MCL 565.25(4) because the Comerica mortgage was recorded at the time of the transaction.

HFN attempts to rely on the exception to the application of MCL 565.25(4) articulated in *Ameriquest II*, i.e., that a court should invoke its equitable powers only upon allegations of fraud, mutual mistake, or any other unusual circumstance. *Id.* at slip op p 9; see also *Devillers, supra* at 590. HFN claims that it clearly completed its loan to the Rogows under the mistaken belief about who held the Comerica mortgage, as evidenced by indications that all three mortgages were to be discharged before the HFN loan was completed. As a doctrine used primarily as a contractual defense to an otherwise valid contract, to establish a mutual mistake of fact, an individual must show that both parties were mistaken concerning an existing fact that was material to the agreement. *Gortney v Norfolk & Western Railway Co*, 216 Mich App 535; 549 NW2d 612 (1996). Here, HFN merely suggests that a unilateral mistake occurred on its behalf and does not suggest that any mutual mistake occurred.[4]

Affirmed.

/s/ Peter D. O'Connell
/s/ Henry William Saad
/s/ Michael J. Talbot

[4] Additionally, HFN asserts that these same facts suggest possible fraud that led to its refinancing. However, HFN does not explain who was involved in any alleged fraud, and a mere statement without citing authority is insufficient to raise an issue before this Court. *Wilson v Taylor*, 457 Mich 232, 243; 577 NW2d 100 (1998).