

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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RESIDENTIAL FUNDING COMPANY, L.L.C.,

Plaintiff-Appellant,

v

FIFTH THIRD BANK,

Defendant-Appellee,

and

KIMBERTLY A. JONES, SHERYL C. JONES,  
and FLAGSTAR BANK,

Defendants.

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UNPUBLISHED

January 20, 2011

No. 294564

Oakland Circuit Court

LC No. 2008-094346-CH

Before: JANSEN, P.J., and OWENS and SHAPIRO, JJ.

PER CURIAM.

Plaintiff Residential Funding Company (RFC) appeals by right the circuit court's order granting summary disposition in favor of defendant Fifth Third Bank (Fifth Third). We affirm.

I

Defendants Kimbertly and Sheryl Jones purchased a home and property in Lake Orion Township (the property) for approximately \$1,400,000. They obtained a loan in the amount of \$999,000 from Great Lakes Mortgage Company (Great Lakes) on September 23, 2005. This loan was secured by a first mortgage, which was held by Great Lakes and recorded on October 25, 2005. Defendant Flagstar Bank (Flagstar) subsequently acquired Great Lakes and thus became the holder of this first mortgage.

Also on September 23, 2005, Kimbertly and Sheryl Jones obtained a second loan in the amount of \$306,197 from Fifth Third. This loan was secured by a second mortgage, which was held by Fifth Third and recorded on November 23, 2005.

Thereafter, Kimbertly and Sheryl Jones approached Mortgage Investment Lending Associates, Inc. (MILA) about obtaining a new loan to pay off their first mortgage. On December 27, 2005, Flagstar issued a payoff letter to MILA, certifying that the current payoff amount for the first mortgage was \$1,007,541.05. In order to pay off this amount, Kimbertly and

Sheryl Jones applied for a new loan from MILA in the amount of \$1,015,000. They did not disclose the existence of the second mortgage held by Fifth Third in their application to MILA.

On December 28, 2005, MILA loaned \$1,015,000 to Kimbertly and Sheryl Jones. This new loan was secured by a third mortgage, which was held by Mortgage Electronic Registration Systems, Inc. (MERS), as MILA's nominee, and which was recorded on January 26, 2006. Thereafter, plaintiff RFC became the successor in interest of MILA, and acquired MILA's rights under the MILA mortgage note.

From the proceeds of the \$1,015,000 MILA loan, \$1,008,156.21 was paid to Flagstar to pay off the first mortgage loan. Upon receipt of the funds, Flagstar released and discharged the first mortgage on March 7, 2006.

Kimbertly and Sheryl Jones subsequently defaulted on the MILA loan, and the MILA mortgage was foreclosed on January 15, 2008. MERS, as the lender's nominee, was the winning bidder. A sheriff's deed was issued to MERS and was recorded on January 24, 2008. MERS then conveyed its interest in the property to RFC by quit claim deed.

Kimbertly and Sheryl Jones also defaulted on the Fifth Third loan. Fifth Third therefore foreclosed its mortgage on March 18, 2008. Fifth Third was the winning bidder, and a second sheriff's deed was issued to Fifth Third. This second sheriff's deed was recorded on March 25, 2008.

RFC filed its complaint in this matter on September 8, 2008. RFC requested that the circuit court declare that its mortgage had priority over the prior-recorded Fifth Third mortgage. Specifically, RFC alleged that it should be subrogated to the position of Flagstar and that its junior mortgage should therefore take priority over Fifth Third's prior-recorded mortgage under the doctrine of equitable subrogation. RFC also requested that the circuit court allow it to rescind the \$1,015,000 loan to Kimbertly and Sheryl Jones, or alternatively, that the circuit court require Flagstar to reimburse it in the amount of \$1,008,156.21. RFC further requested that the circuit court stay the running of the period of redemption on the Fifth Third mortgage in order to allow it to "protect its interest in the subject property" by redeeming the Fifth Third mortgage from foreclosure.

The circuit court entered a temporary restraining order staying the running of the period of redemption for one week in order to allow RFC to redeem the Fifth Third mortgage from foreclosure. The Fifth Third mortgage was redeemed from foreclosure by way of payment to Fifth Third in the amount of \$345,076.49 in late September 2008.<sup>1</sup>

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<sup>1</sup> A certificate of redemption contained in the lower court record indicates that this amount was paid by Kimbertly and Sheryl Jones. However, several other documents contained in the lower court record, including the transcript of the circuit court motion hearing of September 17, 2008, suggest that the \$345,076.49 redemption amount was actually paid to Fifth Third by RFC.

Defendants Kimbertly and Sheryl Jones filed for bankruptcy and were apparently never served with process. On June 30, 2009, the circuit court dismissed with prejudice all claims against defendant Flagstar. Therefore, the matter proceeded against defendant Fifth Third only.

Fifth Third moved for summary disposition pursuant to MCR 2.116(C)(8) and (10), arguing that its mortgage was superior to that of RFC and that RFC was not entitled to invoke the doctrine of equitable subrogation in this case. Fifth Third pointed out that although its mortgage was recorded on November 23, 2005, RFC's mortgage was not recorded until January 26, 2006. Fifth Third argued that because its mortgage had been earlier recorded, it had priority over the RFC interest. Fifth Third also pointed out that most of RFC's legal arguments concerning equitable subrogation had already been rejected by this Court in *Washington Mutual Bank v Shorebank Corp*, 267 Mich App 111; 703 NW2d 486 (2005), and *Ameriquest Mortgage Co v Alton*, 273 Mich App 84; 731 NW2d 99 (2007).

Following oral argument on the motion, the circuit court granted summary disposition in favor of Fifth Third. The court determined that it was beyond genuine factual dispute that the Fifth Third mortgage had been recorded previously to, and was therefore superior in priority to, the RFC mortgage. The court also ruled as a matter of law that RFC was not entitled to invoke the doctrine of equitable subrogation in this case. The court consequently dismissed with prejudice all of RFC's remaining claims.

## II

We review de novo a circuit court's decision to grant or deny a motion for summary disposition. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). Whether one mortgage is entitled to priority over another, prior-recorded mortgage is a question of law that we review de novo on appeal. *Graves v American Acceptance Mortgage Corp*, 469 Mich 608, 613; 677 NW2d 829 (2004). We similarly review de novo the applicability of the doctrine of equitable subrogation, *Auto-Owners Ins Co v Amoco Production Co*, 468 Mich 53, 57; 658 NW2d 460 (2003), as well as all other questions of law, *In re Rudell Estate*, 286 Mich App 391, 403; 780 NW2d 884 (2009).

## III

RFC argues that it should have been subrogated to the position of Flagstar and that its junior mortgage therefore should have taken priority over Fifth Third's prior-recorded mortgage under the doctrine of equitable subrogation. We disagree.

It is uncontroverted that the Fifth Third mortgage was recorded before the RFC mortgage. Fifth Third's mortgage was recorded on November 23, 2005, and RFC's mortgage was not recorded until January 26, 2006. "Michigan is a race-notice state, and owners of interests in land can protect their interests by properly recording those interests." *Richards v Tibaldi*, 272 Mich App 522, 539; 726 NW2d 770 (2006), quoting *Lakeside Associates v Toski Sands*, 131 Mich App 292, 298; 346 NW2d 92 (1983). "Under MCL 565.29, the holder of a real estate interest who first records his or her interest generally has priority over subsequent purchasers." *Richards*, 272 Mich App at 539. "The recordation of a mortgage constitutes constructive notice to all subsequent lienholders regarding both the existence of the mortgage and the amount of

indebtedness that is secured.” *Ameriquest*, 273 Mich App at 93. If a mortgage has been properly recorded, all subsequent purchasers or encumberancers “take subject to any lien the mortgagor may have on the property whether the record has been examined or not.” *Id.* at 94.

There can be no dispute that the Fifth Third mortgage, having been first recorded, has priority over RFC’s mortgage. *Id.* The failure of RFC or RFC’s predecessor in interest to discover Fifth Third’s duly recorded prior mortgage “does not serve to nullify the constructive notice provided by the recordation or to alter the priority status of [Fifth Third’s] mortgage.” *Id.*

Despite the fact that Fifth Third’s mortgage was recorded first, RFC contends that its mortgage is entitled to priority under the doctrine of equitable subrogation. However, a strikingly similar argument has already been soundly rejected by this Court in *Ameriquest*. In the present case, neither RFC nor its predecessor in interest was under any legal or equitable duty to loan money to Kimbertly and Sheryl Jones or to assist them in refinancing the Flagstar mortgage. Nor did RFC or its predecessor have any preexisting interest in the property. See *Ameriquest*, 273 Mich App at 97-98. Instead, RFC’s predecessor in interest acted as a mere volunteer, voluntarily advancing the \$1,015,000 to Kimbertly and Sheryl Jones without any legally cognizable obligation to do so. As a “mere volunteer,” MILA would have been “precluded from invoking the doctrine [of equitable subrogation] to attain a more favorable position of priority than that afforded by the order in which the instrument or mortgage was recorded.” *Id.* at 96. Therefore, we conclude that RFC, as MILA’s successor in interest, is similarly precluded from invoking the doctrine of equitable subrogation in this case. Indeed, “[t]here is plenty of authority in Michigan holding that a court of equity will not subrogate a volunteer to the rights of a mortgagee under a mortgage paid by him.” *Leser v Smith*, 219 Mich 509, 512; 189 NW 38 (1922). We reject RFC’s argument that it is entitled to be equitably subrogated to a position of superior priority in the instant case.

RFC raises several arguments concerning fraud. It claims that MILA, its predecessor in interest, was defrauded by Kimbertly and Sheryl Jones, who failed to disclose the existence of the preexisting Fifth Third mortgage when they applied for the MILA loan. But these arguments were also flatly rejected in *Ameriquest*. While it is apparently true that Kimbertly and Sheryl Jones falsely informed MILA that no mortgages existed other than the senior Flagstar mortgage, RFC “has not alleged any wrongdoing on the part of [Fifth Third] to support the intervention of equity.” *Ameriquest*, 273 Mich App at 98.

We similarly reject RFC’s argument that MILA mistakenly loaned the funds to Kimbertly and Sheryl Jones, and would not have done so if it had known about the prior-recorded Fifth Third mortgage. Even assuming *arguendo* that MILA’s seemingly unwise decision to loan \$1,015,000 to Kimbertly and Sheryl Jones could be characterized as a “mistake,” RFC has failed to allege any *mutual mistake* in relation to Fifth Third. See *id.* at 99-100. We perceive no error in the circuit court’s determination that RFC was not entitled to be equitably subrogated to a position of superior priority.

#### IV

RFC also argues that the circuit court erred by declining to consider and grant its various other requests for equitable relief. Specifically, RFC contends that the circuit court should have

exercised its equitable powers to order restitution, to cancel or undo the \$1,015,000 loan, to impose an equitable lien with priority over the Fifth Third mortgage, to impose a constructive trust on the property, or to reform or cancel Flagstar's discharge of the first mortgage. RFC again relies on allegations of fraud and mistake to support its assertion that the court should have exercised its equitable powers liberally in this case. We cannot agree.

We fully acknowledge that the circuit court has broad equitable powers. MCL 600.601(1)(b); *Lester v Spreen*, 84 Mich App 689, 695; 270 NW2d 493 (1978). But it is well settled that nothing will call a court of equity into action but conscience, good faith, and reasonable diligence. *Henderson v Connolly's Estate*, 294 Mich 1, 19; 292 NW 543 (1940); *Douglass v Douglass*, 72 Mich 86, 98-99; 40 NW 177 (1888). Indeed, "[e]quity will not assist a man whose condition is attributable only to that want of diligence which may be fairly expected from a reasonable person." *Powers v Indiana & Michigan Electric Co*, 252 Mich 585, 588; 233 NW 424 (1930) (citation omitted). MILA, as RFC's predecessor in interest, could have easily performed a simple search of the Oakland County land records before loaning the \$1,015,000 to Kimbertly and Sheryl Jones. By performing such a search, MILA would have discovered the existence of the earlier-recorded Fifth Third mortgage, and could have consequently rejected the Jones' loan application or taken other self-protective measures. But MILA did not perform such a search or otherwise act in what could be reasonably characterized as a diligent manner. Instead, RFC's predecessor in interest proceeded to loan the funds to Kimbertly and Sheryl Jones without taking even relatively simple steps to protect its own interests. Given this lack of diligence on the part of RFC's predecessor in interest, we cannot conclude that the circuit court erred by failing to entertain RFC's various other requests for equitable relief.

V

Because RFC or its predecessor in interest was charged with constructive notice of Fifth Third's prior-recorded mortgage, RFC was not entitled to step into the position of the senior lienholder under the doctrine of equitable subrogation. *Ameriquest*, 273 Mich App at 98. Moreover, RFC's allegations of fraud and mutual mistake were not sufficient to warrant the extraordinary relief requested here. The circuit court did not err by determining that the Fifth Third mortgage was superior in priority to the RFC mortgage or that RFC was not entitled to invoke the doctrine of equitable subrogation. Summary disposition was properly granted in favor of Fifth Third.

Affirmed. As the prevailing party, Fifth Third may tax costs pursuant to MCR 7.219.

/s/ Kathleen Jansen  
/s/ Donald S. Owens  
/s/ Douglas B. Shapiro