STATE OF MICHIGAN

COURT OF APPEALS

NEW CENTER COMMONS CONDOMINIUMS ASSOCIATION, Plaintiff-Appellant, v ANDRE ESPINO and QUICKEN LOANS, INC., Defendants, and GREEN TREE SERVICING, LLC, Defendant-Appellee.	UNPUBLISHED June 24, 2014 No. 314702 Wayne Circuit Court LC No. 12-001201-CH

Before: DONOFRIO, P.J., and GLEICHER and M.J. KELLY, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's order denying plaintiff's motion for summary disposition, granting summary disposition in favor of defendant Green Tree Servicing, LLC ("Green Tree"), and ordering that Green Tree's mortgage had priority over plaintiff's lien. Because Green Tree's mortgage was not the "first mortgage of record," we reverse and remand for entry of summary disposition in favor of plaintiff.

I. BASIC FACTS

This case arises out of a foreclosure action filed by plaintiff in order to recover unpaid condominium assessments by defendant Andre Espino. The parties do not dispute the following underlying timeline of events:

November 18, 2005:	Espino executed mortgage for $35,000 in favor of Quicken Loans for purchase of condominium unit (mortgage will be referred to as the "Green Tree mortgage" because it was later assigned to Green Tree)

April 12, 2006:	Espino executed another mortgage for $13,000 in favor of National City Bank (mortgage will be referred to as the "PNC mortgage" because PNC Bank later acquired National City Bank)
May 12, 2006:	PNC mortgage was recorded
September 25, 2006:	Green Tree mortgage was recorded
October 20, 2011:	Plaintiff recorded lien for Espino's failure to pay condominium assessments
January 7, 2012:	Plaintiff filed complaint in circuit court
December 14, 2012:	Plaintiff moved for summary disposition under MCR 2.116(C)(10)
December 28, 2012:	PNC Bank and Green Tree entered into a subordination agreement, where they agree that the Green Tree mortgage will have priority over the PNC mortgage[1]

In its complaint, plaintiff was seeking to foreclose on its lien and/or obtain a money judgment for the unpaid assessments.

In its motion for summary disposition, plaintiff argued that pursuant to MCL 559.208, its lien had priority over all other liens except for state and federal tax liens and a "first mortgage of record." Plaintiff contended that since the PNC mortgage was recorded first, that mortgage was the "first mortgage of record," making plaintiff's lien junior to the PNC mortgage but giving it priority over the Green Tree mortgage.

Green Tree responded to plaintiff's motion and argued that its lien had priority over plaintiff's lien because PNC Bank subsequently subordinated its mortgage priority to Green Tree's mortgage. Green Tree also argued that PNC Bank was aware of the already-existing Green Tree mortgage when it received its mortgage from Espino. Green Tree further argued that the PNC mortgage always was intended to be junior and subordinate in priority to Green Tree's mortgage, as evidenced by the subordination agreement the parties executed.

In a reply brief, plaintiff argued that the subordination agreement was insufficient to establish Green Tree's priority because the agreement did not affect the fact that PNC Bank recorded its mortgage before Green Tree.

[1] It appears from the document that this agreement was never recorded.

At the January 11, 2013, hearing on plaintiff's motion, the trial court denied plaintiff's request for summary disposition on the issue of its lien having priority over the Green Tree mortgage. The court reasoned that the term "first mortgage of record" must be "construed in accordance with MCL 565.25 and MCL 565.29" and held that, because PNC Bank had knowledge of Green Tree's mortgage, Green Tree's mortgage had priority over plaintiff's lien under MCL 559.208(1). Consequently, the court entered an order denying plaintiff's motion for summary disposition and, instead, granted summary disposition in favor of Green Tree on the issue of priority.

II. ANALYSIS

Plaintiff argues that the trial court erred in determining that the Green Tree mortgage had priority over the PNC mortgage, thereby making plaintiff's lien subordinate to the Green Tree mortgage. We agree.

A.

This Court reviews a trial court's decision on a motion for summary disposition de novo. *Johnson v Recca*, 492 Mich 169, 173; 821 NW2d 520 (2012). A motion for summary disposition under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Joseph v Auto Club Ins Ass'n*, 491 Mich 200, 206; 815 NW2d 412 (2012). This Court reviews a "motion brought under MCR 2.116(C)(10) by considering the pleadings, admissions, and other evidence submitted by the parties in the light most favorable to the nonmoving party." *Latham v Barton Malow Co*, 480 Mich 105, 111; 746 NW2d 868 (2008). Summary disposition "is appropriate if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." *Id.* "[A] genuine issue of material fact exists when, viewing the evidence in a light most favorable to the nonmoving party, the record which might be developed . . . would leave open an issue upon which reasonable minds might differ." *Debano-Griffin v Lake Co*, 493 Mich 167, 175; 828 NW2d 634 (2013) (quotation marks omitted).

> But to the extent that our review involves issues of statutory interpretation, that aspect of our review is de novo. The primary goal of statutory interpretation is to give effect to the intent of the Legislature. To ascertain the Legislature's intent, we look to the language in the statute and give the words their plain and ordinary meanings. If the plain and ordinary meaning is otherwise clear, judicial construction is neither necessary nor permitted. Judicial construction is only appropriate when an ambiguity exists in the language of the statute. A statue is ambiguous when it irreconcilably conflicts with another provision or is equally susceptible to more than a single meaning. [*Fed Nat'l Mortgage Ass'n v Lagoons Forest Condo Ass'n*, ___ Mich App ___; ___ NW2d ___ (Docket No. 313953, issued May 15, 2014), slip op, p 3 (quotation marks and citations omitted).]

B.

Neither party contests that MCL 559.208(1) of Michigan's Condominium Act, MCL 559.101 *et seq.*, applies in the instant case. That statute provides condominium assessment liens with "super-priority status" and states the following:

> Sums assessed to a co-owner by the association of co-owners that are unpaid together with interest on such sums, collection and late charges, advances made by the association of co-owners for taxes or other liens to protect its lien, attorney fees, and fines in accordance with the condominium documents, constitute a lien upon the unit or units in the project owned by the co-owner at the time of the assessment *before other liens except* tax liens on the condominium unit in favor of any state or federal taxing authority and *sums unpaid on a first mortgage of record* . . . . [Emphasis added.]

The crucial issue in the instant case is the meaning of the phrase "first mortgage of record." Based on the language in the statute, the trial court determined that Green Tree's mortgage was the "first mortgage of record." However, the trial court failed to apply this Court's definition of "first mortgage of record" as provided in *Coventry Parkhomes Condo Ass'n v Fed Nat'l Mortgage Ass'n*, 298 Mich App 252; 827 NW2d 379 (2012). The Court, after recognizing that the Condominium Act did not define the term, consulted the Act's definition of "record"[2] and the dictionary's definition of "first"[3] and came up with the following definition for the phrase "first mortgage of record":

> [T]he plain meaning of "first mortgage of record" as used in MCL 559.208(1) is the mortgage that is recorded before all others with respect to time pursuant to the laws of this state relating to the recording of deeds. [*Id.*]

Thus, the *Coventry* Court, while acknowledging that Michigan's race-notice scheme[4] generally governs priority disputes, *id.* at 256, determined that with respect to a condominium association's lien, only a race scheme applies when determining which mortgage is a "first mortgage of record." Accordingly, applying this Court's definition results in the PNC mortgage

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[2] The Court noted that "record" was defined in the Act as "to record pursuant to the laws of this state relating to the recording of deeds." *Coventry*, 298 Mich App at 259, citing MCL 559.110(1).

[3] The Court noted that "first" meant "'being before all others with respect to time, order, rank, importance, etc.'" *Coventry*, 298 Mich App at 260, quoting *Random House Webster's College Dictionary* (2001).

[4] In a race-notice jurisdiction, "the person who records first, without knowledge of prior unrecorded claims, has priority." *Black's Law Dictionary* (9th ed); see also *Richards v Tibaldi*, 272 Mich App 522, 539; 726 NW2d 770 (2006). Thus, "a later interest holder may take priority over a prior conveyed interest only if the later interest holder takes in 'good faith.'" *Coventry*, 298 Mich App at 256. "'A good-faith purchaser is one who purchases *without notice* of a defect in the vendor's title.'" *Id.* (emphasis added), quoting *Mich Nat'l Bank & Trust Co v Morren*, 194 Mich App 407, 410; 487 NW2d 784 (1992).

being the "first mortgage of record" because it was recorded before the Green Tree mortgage. Consequently, because plaintiff's lien had super-priority over all other mortgages except for the first mortgage of record, it had priority over the Green Tree mortgage, and the trial court erred in ruling otherwise.

The trial court decided that *Coventry*'s definition, even though contained in a published opinion, was not binding because the opinion dealt with a different factual scenario. Instead, the trial court decided that "first mortgage of record" had to be construed in context with this state's general race-notice scheme as described in MCL 565.29.[5] Thus, the trial court adopted the definition of "first mortgage of record," as provided by this Court in *Wexford Parkhomes Condo Ass'n v Katzman*, unpublished opinion per curiam of the Court of Appeals, issued May 22, 2008 (Docket No. 277746), slip op, p 4, which was "the first mortgage of record *without notice of another mortgage*." (Emphasis added.)

Coventry, indeed, is distinguishable, because the issue the Court was confronted with was determining what effect assigning a "first mortgage of record" had on that mortgage's priority. *Coventry*, 298 Mich App at 255. In *Coventry*, the owner purchased a condominium unit and executed a mortgage in favor of JP Morgan Case, which undisputedly was the "first mortgage of record." Thereafter, the plaintiff condominium association recorded a lien against the unit for unpaid association fees and dues. A year after the lien was recorded, Chase assigned its interest in the mortgage to Federal National Mortgage Association ("FNMA"). *Id.* at 254. The primary issue before the Court was whether the assignment of the "first mortgage" altered the character of that mortgage so that it no longer was considered a "first mortgage." *Id.* at 255. The trial court ruled that the assigned mortgage lost its character as a first mortgage, which resulted in the condominium lien having priority over it. *Id.* However, this Court reversed because it reasoned that an assignee stands in the shoes of its assignor, *id.* at 256-257, and as such, "[t]he assignment to FNMA did not change [its status]," *id.* at 260.

Therefore, we agree with the trial court that the *Coventry* Court's definition of "first mortgage of record," which omitted any reference to notice, should be viewed cautiously because the issue of notice was not germane, given that there was only one mortgage at issue—the Chase mortgage, which subsequently got assigned to FNMA. The parties in *Coventry* never disputed that the Chase mortgage was the "first mortgage of record" under any conceivable definition. What was disputed, and what this Court was confronted with, was the *effect of*

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[5] MCL 565.29 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.

assigning that "first" mortgage. However, the fact that *Coventry* acknowledged the general race-notice scheme of this state, *id.* at 256, yet failed to include notice into its definition, *id.* at 260, may indicate that its omission was intentional.

Regardless, even if the concept of notice is added to the definition, as the trial court thought appropriate, the court still arrived at the wrong conclusion. There was no question that the PNC mortgage was recorded before the Green Tree mortgage. Thus, under the *Wexford* definition of "first mortgage of record" that the trial court utilized, the only way that the Green Tree mortgage could be deemed senior to the PNC mortgage is if PNC Bank had knowledge, constructive or otherwise, that the Green Tree mortgage was in existence at the time the PNC mortgage was executed. However, there was no evidence in the lower court record indicating that PNC Bank had such knowledge. The trial court impermissibly speculated that PNC Bank "would not have agreed" to enter into the subordination agreement "if, in fact, it did not have notice of the first mortgage." But speculation, conjecture, assumptions, and mere allegations are not sufficient to overcome a motion for summary disposition. *Karbel v Comerica Bank*, 247 Mich App 90, 97; 635 NW2d 69 (2001). The fact that the parties entered into a subordination agreement, over six years after the latest mortgage was recorded and two weeks after plaintiff moved for summary disposition, was not evidence that PNC Bank had notice of the Green Tree mortgage at the time PNC Bank executed its mortgage.[6] We note that Green Tree also argues that PNC Bank had knowledge because Espino revealed the Green Tree mortgage's existence when he applied for the PNC mortgage. However, there was no evidence submitted to the trial court to support this allegation.

Therefore, regardless of what definition is used, the trial court erred in concluding that the Green Tree mortgage was the "first mortgage of record." The PNC mortgage was recorded first; plus, there was no evidence that the PNC Bank had knowledge of the Green Tree mortgage when PNC Bank executed its mortgage.

Reversed and remanded for entry of summary disposition in favor of plaintiff on the issue of its lien having priority over the Green Tree mortgage. We do not retain jurisdiction. Plaintiff, as the prevailing party, may tax costs pursuant to MCR 7.219.

/s/ Pat M. Donofrio
/s/ Elizabeth L. Gleicher
/s/ Michael J. Kelly

[6] Because we are not faced with the scenario of a subordination agreement being recorded, pursuant to MCL 565.391, before a condominium association records its lien, we need not discuss what effect, if any, such a recorded agreement would have.