

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

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PTPS, INC.,

Plaintiff/Counter-Defendant/Appellee,

v

B & B INVESTMENT GROUP,

Defendant/Counter-Plaintiff/  
Appellant,

and

HARRY BORCHERDING and  
ALAN BORCHERDING,

Defendants-Appellants.

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Before: Hoekstra, P.J., and Marilyn Kelly and J.B. Sullivan,\* JJ.

PER CURIAM.

In this action involving a dispute among mortgagees and holders of sheriff's deeds involving real property, defendants appeal as of right from an order granting summary disposition in favor of plaintiff and declaring that plaintiff had title to the property. We affirm.

The property at issue in this case was owned by Sabri and Souriya Denha, and was encumbered by three mortgages and a judgment lien. During the course of these proceedings, sheriff's deeds issued after foreclosure sales with respect to the first mortgage, held by defendant B & B Investment, and the second mortgage, held by plaintiff, were redeemed. These redemptions are not at issue in this appeal. Joe Acho, the holder of an interest in the property purchased upon execution of his judgment lien, transferred his interest to plaintiff via a quit-claim deed. This interest ripened into title upon expiration of the period for redemption.

\* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

During the summer of 1993, defendant Harry Borcharding initiated foreclosure proceedings with regard to the third mortgage. Kelly Kowalski successfully bid \$143,136.86 at a foreclosure sale held on September 7, 1993, and received a sheriff's deed. Prior to expiration of the thirty-day redemption period, plaintiff moved to set aside the sale and void the deed, and the trial court granted plaintiff's motion. The trial court subsequently granted summary disposition in favor of plaintiff and declared that plaintiff had title to the property.

Defendants contend that the trial court erred when it set aside the sheriff's sale with respect to the third mortgage held by defendant Harry Borcharding. The decision to set aside a sheriff's sale is a matter of equity, which we review de novo. *Mitchell v Dahlberg*, 215 Mich App 718, 727; 547 NW2d 74 (1996); see also *Federal Land Bank of St. Paul v Edwards*, 262 Mich 180; 247 NW 147 (1933). Foreclosures by advertisement of a mortgage containing a power of sale using the statutory procedure, MCL 600.3201 *et seq.*; MSA 27A.3201 *et seq.*, are contractual in nature. A statutory foreclosure will not be set aside "without some good reasons therefor." *Cramer v Metropolitan Savings & Loan Ass'n*, 401 Mich 252, 261; 258 NW2d 20 (1977), quoting *White v Burkhardt*, 338 Mich 235, 239; 60 NW2d 925 (1953).

Defendants initially argue that here equitable relief was inappropriate because plaintiff failed to act promptly to protect its interest. We disagree. "[I]n seeking to set aside a foreclosure sale, the moving party must act promptly after he becomes aware of the facts upon which he bases his complaint." *Kuschinski v Equitable & Central Trust Co*, 277 Mich 23, 26; 268 NW 797 (1936). In an order entered on July 21, 1993, the trial court held that plaintiff failed to redeem from the first mortgage foreclosure sale. When not redeemed, a sheriff's deed ripens into legal title and cuts off all junior interests in the property that were not consented to by the mortgagee. *Senters v Ottawa Savings Bank*, 443 Mich 45, 50; 503 NW2d 639 (1993); MCL 600.3236; MSA 27A.3236; see *Hanson v Huetter*, 339 Mich 130, 133-134; 62 NW2d 663 (1954). Here, it was not until September 20, 1993, that the trial court vacated its order and reinstated the third mortgage and the judgment lien. We believe that plaintiff acted promptly to protect its interest in the property after both its interest and the third mortgage were reinstated. *Kuschinski, supra* at 26.

Upon review of the circumstances surrounding the foreclosure on the third mortgage, we find that the trial court did not err in setting aside the sheriff's sale. The use of the statutory foreclosure by advertisement procedure is contingent on there being a power of sale in the mortgage contract and the mortgagee being in default.

*Every mortgage of real estate, which contains a power of sale, upon default being made in any condition of such mortgage, may be foreclosed by advertisement, in the cases and in the manner specified in this chapter. [MCL 600.3201; MSA 27a.3201 (emphasis added).]*

The statute clearly presupposes the existence of a lien on the property because, by its very definition, a mortgage is a lien on real estate securing payment for performance of an obligation. *McKeighan v Citizens Commercial & Savings Bank of Flint*, 302 Mich 666, 670; 5 NW2d 524 (1942); *Foote v*

*City of Pontiac*, 161 Mich App 60, 65; 409 NW2d 756 (1987). The third mortgage was cut off by the trial court's July, 1993, order, and was not reinstated until two weeks after the foreclosure sale was conducted. Thus, foreclosure proceedings were improperly conducted when, as a consequence of the trial court's earlier order, the holder of the third mortgage had no interest in the property. We do not view plaintiff's conduct in initiating this litigation to challenge defendant B & B Investment Group's redemption from the first mortgage foreclosure sale to be an indication of overreaching or unfairness sufficient to bar equitable relief. *Royce v Duthler*, 209 Mich App 682, 689; 531 NW2d 817 (1995).

Defendants next argue that the trial court improperly granted summary disposition in favor of plaintiff when there were unresolved questions of fact. We review the trial court's grant of summary disposition de novo. *Portelli v I R Construction Products Co, Inc*, 218 Mich App 591, 596; 554 NW2d 591 (1996). Giving the nonmoving party the benefit of any reasonable doubt, summary disposition pursuant to MCR 2.116(C)(10) is proper only if the record which might be developed will leave open no issues upon which reasonable minds may differ. *Id.* Defendants contend that factual questions regarding plaintiff's interest in the property precluded summary disposition. We disagree. As defendants' challenges to the agreement underlying Acho's transfer of his interest to plaintiff would render the contract voidable, not void, they cannot be raised in a collateral attack on the quit-claim deed recorded by plaintiff. See 23 Am Jur 2d, Deeds, §188, p. 204.

Defendants' final contention is that the trial court improperly granted summary disposition in favor of plaintiff because plaintiff's tender of payment on the third mortgage did not include the \$99,529.10 spent by defendant B & B Investment Group to redeem from the second mortgage foreclosure sale. On September 3, 1993, defendant B & B Investment Group assigned to defendant Harry Borcharding its interest in the property, as declared in a recorded affidavit of interest evidencing its claim for expenditures made to redeem from first mortgage. In *Senters*, *supra* at 50-56, the Court held that neither under the statute, MCL 600.3240; MSA 27A.3240, nor an equitable lien theory, could the holder of a sheriff's deed recover amounts paid to redeem from a foreclosure sale of another interest in the property. Pursuant to the Court's holding in *Senters*, defendant B & B Investment Group had no additional interest in the property. Since the assignment to defendant Harry Borcharding conferred no greater proprietary interest than possessed by B & B Investment Group, *Brownell Realty, Inc v Kelly*, 103 Mich App 690, 696; 303 NW2d 871 (1981), he was not entitled to additional compensation. Therefore, plaintiff's tender of payment satisfied the indebtedness. Accordingly, the trial court properly granted summary disposition in plaintiff's favor because it was the only entity with an interest in the property.

Affirmed.

/s/ Joel P. Hoekstra  
/s/ Joseph B. Sullivan

Judge Marilyn Kelly did not participate.