

STATE OF MICHIGAN
COURT OF APPEALS

WACHOVIA BANK, N.A., as Trustee
(BAYVIEW),

Plaintiff-Appellant,

v

GREGORY MOORE,

Defendant/Cross-Defendant-
Appellee,

and

SILVIO SAVO and SANDRA SAVO,

Defendants/Cross-Plaintiffs-
Appellees,

and

FREMONT INVESTMENT & LOAN and
DEUTSCHE BANK SECURITIES, INC.,

Defendants-Appellees.

Before: Fort Hood, P.J., and Talbot and Servitto, JJ.

PER CURIAM.

Plaintiff, Wachovia Bank, N.A. (“Wachovia”), appeals as of right from an order denying its motion for summary disposition and granting summary disposition in favor of defendants/cross-plaintiffs, Silvio Savo and Sandra Savo (“the Savos”), and defendant, Fremont Investment & Loan (“Fremont”) (collectively, “defendants”). We vacate and remand.

This Court reviews de novo the grant or denial of a motion for summary disposition. *Badiee v Brighton Area Schools*, 265 Mich App 343, 351; 695 NW2d 521 (2005). Further, this Court reviews the underlying issue of statutory construction de novo, *Eggleston v Bio-Medical Applications of Detroit, Inc*, 468 Mich 29, 32; 658 NW2d 139 (2003), because it involves the application of the law, i.e., the race/notice statutes, to undisputed facts regarding the recordation

of mortgages, *Steward v Panek*, 251 Mich App 546, 554; 652 NW2d 232 (2002). With regard to the circuit court's application of the doctrine of laches, this Court reviews equitable actions de novo but reviews the trial court's factual findings for clear error. *McFerren v B & B Investment Group*, 253 Mich App 517, 522; 655 NW2d 779 (2002) (citation omitted).

Plaintiff argues that its previously recorded mortgage interest was constructively, if not actually, known to the Savos and, thus, under MCL 565.29, the Savos took the property subject to plaintiff's security interest. Defendants argue that the Savos took the property free and clear of all encumbrances because the Savos are good faith purchasers. The circuit court granted summary disposition in favor of defendants under MCR 2.116(I)(2), ruling, "the Court believes that the Savos, as a matter of law, are [bona fide purchasers] without notice."

Under the language of MCL 565.29, "Michigan is a race-notice state . . . and owners of interests in land can protect their interests by properly recording those interests." *Lakeside Associates v Toski Sands*, 131 Mich App 292, 298; 346 NW2d 92 (1983). Recorded liens, rights, and interests in property take priority over subsequent owners and encumbrances. MCL 565.25. Where an individual fails to record an interest, that interest is void against any subsequent holder who purchased the interest in good faith for valuable consideration and who records first. MCL 565.29. Therefore, in order for defendants to take title free and clear of encumbrances under MCL 565.29, the Savos must show that they were good faith purchasers and that they recorded their interest before plaintiff. If the Savos satisfy MCL 565.29, Fremont, having secured a subsequent assignment from the Savos, would be also be protected against plaintiff's claims. See *Burkhardt v Bailey*, 260 Mich App 636, 653; 680 NW2d 453 (2004) (a mortgage assignee has the same rights and is subject to the same defenses as the original mortgagee).

A. Whether the Savos Were "Good Faith Purchasers"

Plaintiff argues that the circuit court erred by ruling that the Savos were good faith purchasers who did not have notice of its interest in the property. Examining the issue of good faith under MCL 565.29, "[a] person who purchases property without notice of a defect in the vendor's title is a good-faith purchaser. A person who has notice of a possible defect and fails to make further inquiry into the possible rights of a third party is not a good-faith purchaser and is chargeable with notice of what such inquiries and the exercise of ordinary caution would have disclosed." *Royce v Duthler*, 209 Mich App 682, 690; 531 NW2d 817 (1995) (citations omitted). "Notice is whatever is sufficient to direct attention of the purchaser of realty to prior rights or equities of a third party and to enable him to ascertain their nature by inquiry. Notice need only be of the possibility of the rights of another, not positive knowledge of those rights. Notice must be of such facts that would lead any honest man, using ordinary caution, to make further inquiries in the possible rights of another in the property." *Id.*

Defendants rely on Consec/Green Tree's mortgage discharge, which was recorded on February 29, 2000, more than four years before the Savos purchased the property from Gregory Moore, despite the absence of any recorded evidence that indicates when or how Consec/Green Tree acquired an interest in the property or whether it was authorized to execute such a discharge. In contrast, plaintiff emphasizes the June 15, 2000, assignment by Source One Mortgage of its mortgage interest for this same property to plaintiff, recorded on January 6, 2004, *before* the Savos signed a purchase agreement and almost three months *before* their closing occurred. Having been recorded after the purported discharge of the mortgage by

Conseco/Green Tree, the recorded assignment by Source One should have indicated to the Savos that there is a “possibility of the rights of another” and, thus, provided constructive notice of plaintiff’s interest to the Savos, necessitating further inquiry. *Royce, supra* at 690.

Defendants argue that the discharge by Conseco/Green Tree is dispositive of the constructive notice issue because any recordings, including subsequent assignments, following Conseco/Green Tree’s discharge are insufficient to put the Savos on constructive notice of plaintiff’s interest. In *CPA Co v First Mortgage Co*, 287 Mich 255, 261; 283 NW 574 (1939), the Michigan Supreme Court noted the following legal principle as it relates to the extent of a discharged mortgage’s effect on subsequent purchasers:

Subsequent mortgagees without notice may rely upon the evidence of discharge as shown by the record. A discharge is only conclusive as to those who purchase in good faith. A discharge may be recorded, and still the mortgage be not discharged. A subsequent mortgagee with notice of that fact will not be protected by the record. It is not necessary that the discharge be recorded in order to protect a subsequent purchaser or mortgagee. When such an one receives reliable information, upon which he relies, that a mortgage has been discharged, he will be protected if it turns out that the mortgage was in fact discharged. [*CPA Co, supra* at 261, citing *Moran v Roberg*, 84 Mich 600; 48 NW 164 (1891).]

Contrary to defendants’ assertion, the principle espoused in *CPA Co, supra*, cannot be construed to suggest that a recorded discharge of a mortgage precludes imputation of constructive notice to a subsequent purchaser when, as here, there exists a mortgage assignment and recordation that occurred after the purported discharge. In this instance, Conseco/Green Tree discharged its mortgage interest and recorded the discharge on February 29, 2000. However, the same mortgage that was allegedly owned by Conseco/Green Tree was also assigned to plaintiff by an entirely different mortgage company, Source One, almost four months after the purported discharge. This was sufficient to place defendants on notice of plaintiff’s interest in the property, yet they failed to make any further inquiries to verify the status of the mortgage.

B. Whether the Savos Recorded First

Plaintiff also argues that the Savos did not satisfy MCL 565.29 because plaintiff recorded first by filing a *lis pendens* before the Savos recorded their warranty deed from Moore. Defendants argue that a “*lis pendens*” is not a “conveyance” and therefore cannot satisfy the recording requirement of MCL 565.29.

MCL 565.35 defines “conveyance” “to embrace every instrument in writing, by which any estate or interest in real estate is created, aliened, mortgaged or assigned; or by which the title to any real estate may be affected in law or equity, except wills, leases for a term not exceeding three [3] years, and executory contracts for the sale or purchase of land.” The parties on appeal do not cite to any authority that expressly addresses whether a *lis pendens* is a “conveyance” for purposes of MCL 565.29. However, the purposes of notice of *lis pendens* are to protect the right to litigation regarding real property and to apprise prospective purchasers of disputes about rights in the land. *Kauffman v Shefman*, 169 Mich App 829, 837; 426 NW2d 819 (1988). If statutory language is unambiguous, appellate courts must presume that the Legislature intended the plainly expressed meaning precluding any further judicial construction.

DiBenedetto v West Shore Hosp, 461 Mich 394, 402; 605 NW2d 300 (2000). In light of the purpose of a lis pendens and the definition of “conveyance,” a lis pendens is a “conveyance” for purposes of determining whether the Savos had constructive notice under MCL 565.29 because the definition of “conveyance” embraces “every instrument in writing . . . by which the title to any real estate may be affected in law or equity.”

Plaintiff filed its *lis pendens* on February 19, 2004, and it was recorded on April 5, 2004. The Savos’ executed the warranty deed on April 2, 2004, but the document was not recorded until June 9, 2004, two months after plaintiff’s *lis pendens* was recorded. Because the Savos did not record first, they do not satisfy the “race” element of MCL 565.29.

Notably, on appeal, plaintiff fails to challenge a key element of the circuit court’s ruling. Specifically, the circuit court held that because plaintiff did not ensure that its *lis pendens* was recorded before the Savos closed on the property, “the failure to do this in a timely fashion . . . does amount to laches for the purpose of equitable relief.” “[A]pplication of the doctrine of laches requires the passage of time combined with a change in condition that would make it inequitable to enforce a claim against the defendant.” *Gallagher v Keefe*, 232 Mich App 363, 369; 591 NW2d 297 (1998). “The defendant must prove a lack of due diligence on the part of the plaintiff resulting in some prejudice to the defendant.” *Id.*

Defendants presented evidence that plaintiff learned of Conseco/Green Tree’s discharge of the mortgage on August 13, 2003, but did not immediately take any action to secure and correct its right to the property interest. Plaintiff did not file its *lis pendens* until February 2004 and such was not recorded until *after* the Savos closed on the property in April 2004. Although, plaintiff’s counsel prepared an affidavit, on October 29, 2003, rescinding the discharge of the mortgage, plaintiff failed to record this affidavit. Based on this evidence, the circuit court refused to equitably reinstate plaintiff’s mortgage interest to the detriment of the Savos and instead estopped plaintiff from challenging the Savos’ alleged status as good faith purchasers. However, a court may not act in equity to avoid the application of a statute. *Stokes v Millen Roofing Co*, 466 Mich 660, 671; 649 NW2d 371 (2002). The trial court, in granting summary disposition based on plaintiff’s failure to timely record evidence of its dispute of the Conseco/Green Tree mortgage discharge effectively ignores the existence of the mortgage assignment executed on June 15, 2000, and recorded on January 6, 2004, placing the Savos on constructive notice and obligating them to engage in further inquiry regarding the actual status of the mortgage. As such, any delay by plaintiff in instigating or recording its dispute regarding the purported discharge would only constitute laches had this intervening mortgage assignment not already been existent in the chain of record title.

C. Impact of Moore’s Chapter 13 Bankruptcy Discharge

Finally, plaintiff contends the trial court erred in granting summary disposition in favor of defendants having ruled that because of his bankruptcy, Moore no longer had “personal liability to Wachovia Bank.” Defendants assert that Moore’s bankruptcy discharged any outstanding debt he owed plaintiff, and that without an outstanding debt, plaintiff’s mortgage is a nullity.

Notably, defendants cite no law or evidence to support their arguments and plaintiff devotes only cursory treatment to the issue, including citations to 11 USC 1322(b)(5), 11 USC 1328(a)(1) and *In re Chappell*, 984 F2d 775, 779-780 (CA 7, 1993) as support for its argument

that “long term debts that mature after the completion of a chapter 13 personal reorganization, which are addressed in the reorganization plan, are not discharged by the bankruptcy.” Pursuant to 11 USC 1322(b)(5), a reorganization plan may “provide for the curing of any default within a reasonable time and maintenance of payments while the case is pending on any unsecured claim or secured claim on which the last payment is due after the date on which the final payment under the plan is due.” It appears that 11 USC 1328(a)(1) exempts from discharge those debts “provided for under [11 USC 1322(b)(5)].” Further, *In re Chappell, supra* at 780 provides:

A long term debt dealt with by the chapter 13 plan in the manner authorized under section 1322(b)(5) is excepted from any discharge granted under section 1328, and the creditor's lien remains intact, except to the extent it may have been declared void pursuant to section 506(d). [citing 5 Lawrence P. King, et al. *Collier on Bankruptcy* P 1322.09[1] (1992).]

Although plaintiff has devoted only cursory treatment to the issue, defendants and the circuit court provided merely a conclusory statement that Moore’s bankruptcy discharged his debt to plaintiff. Contrary to this ruling, Moore’s order of discharge from the bankruptcy court specifically exempted debts “provided for under 11 USC Section 1322(b)(5) and on which the last payment is due after the date on which the final payment under the plan was due.” At a minimum, there remains a question of fact regarding whether Moore’s debt was discharged by his bankruptcy. Further, it is disingenuous for Moore to suggest that he is discharged from any debt for the subject property, despite having failed to complete payments and the scheduled 2012 balloon payment having not yet matured, yet is permitted to retain ownership of the property without any ongoing payment obligation to his creditors. The circuit court, therefore, erred by granting summary disposition in favor defendants on this ground.

Vacated and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Karen M. Fort Hood
/s/ Michael J. Talbot
/s/ Deborah A. Servitto