

STATE OF MICHIGAN
COURT OF APPEALS

CREDIT BASED ASSET SERVICING &
SECURITIZATION, LLC,

UNPUBLISHED
March 22, 2007

Plaintiff-Appellant,

v

FLAGSTAR BANK, FSB, JUSTIN P. LAGAN,
JAMES H. BELILL, PATRICK M. LAGAN, and
LORI A. LAGAN,

No. 273198
Saginaw Circuit Court
LC No. 04-054950-CZ

Defendants-Appellees.

Before: Jansen, P.J., and Neff and Hoekstra, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's order granting summary disposition in favor of defendants¹ in this action to quiet title and recognize the first priority position of a mortgage assigned to plaintiff concerning real property purchased by defendant Patrick Lagan after foreclosure on an earlier recorded mortgage. We affirm.

I

This action stems from two separate mortgages that were executed by defendant James Belill in favor of Homegold Mortgage on December 15, 1997. In the course of refinancing his home in Saginaw, Belill executed a mortgage for \$48,749.22 to extinguish a previous mortgage, and he also executed a mortgage for \$16,248.75 to pay off certain unsecured debt. Both mortgages were recorded on December 30, 1997, with the \$16,248.75 mortgage recorded first, and the \$48,749.22 mortgage recorded second. Homegold later assigned the mortgages to separate parties.

When Belill defaulted on the \$16,248.75 loan, in February 1998, the assignee, Associates Mortgage, foreclosed and purchased the property at the foreclosure sale. Associates then listed

¹ Defendant James Belill has not submitted a brief on appeal, but did participate in the proceedings below.

the property for sale with a real estate agent, and the property was purchased by Patrick Lagan on April 11, 2003 for \$56,000. In purchasing the home, Lagan executed a mortgage in favor of defendant Flagstar Mortgage and later executed a second mortgage in favor of his parents.

The successive conveyances stemming from the \$16,248.75 mortgage were all timely recorded, including the assignment to Associates, the foreclosure and sale of the \$16,248.75 mortgage, the subsequent sale to Lagan, the Flagstar mortgage, and the mortgage to Patrick's parents.² The last transaction, the mortgage to Patrick's parents, occurred on July 17, 2003, and was recorded on September 5, 2003.

On January 30, 2004, Homegold assigned the \$48,749.22 mortgage to plaintiff. When plaintiff discovered the earlier foreclosure, sale, and mortgages on the property, plaintiff filed this action to quiet title on the basis that the \$48,749.22 mortgage was senior to the \$16,248.75 mortgage and, therefore, was not extinguished by the sale to Lagan. The trial court granted defendants' motions for summary disposition, concluding that defendants Justin Lagan and Flagstar had no knowledge of plaintiff's interest in the property and, therefore, Lagan was a bona fide purchaser for value. Likewise, the court concluded that defendants Patrick and Lori Lagan had no knowledge of plaintiff's interest and because their interest was recorded nearly five months before plaintiff's interest, Patrick and Lori Lagan were also entitled to summary disposition.

II

This Court reviews de novo a trial court's decision on a motion for summary disposition. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). In deciding a motion under MCR 2.116(C)(10), the trial court must consider the pleadings, affidavits, depositions, admissions or other documentary evidence submitted by the parties in a light most favorable to the nonmoving party to determine whether a genuine issue of fact exists. *Id.*; *Smith v Globe Life Ins Co*, 460 Mich 446, 454; 597 NW2d 28 (1999). Summary disposition is properly granted if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Id.*

A trial court's decision on an equitable action to quiet title is reviewed de novo. *Deutsche Bank Trust Co Americas v Spot Realty, Inc*, 269 Mich App 607; 612; 714 NW2d 409 (2006); *Webb v Smith (After Remand)*, 204 Mich App 564, 568; 516 NW2d 124 (1994). Findings of fact supporting the decision are reviewed for clear error. *Id.*

III

Plaintiff argues that the trial court erred in holding that "defendants were bona fide purchasers" because they did not have notice of plaintiff's mortgage. We disagree.

² The various transactions were each recorded within a matter of weeks.

A bona fide purchaser is one who acquires some interest in real estate for valuable consideration in good faith, without notice of a third party claim of interest. 1 Cameron, Michigan Real Property Law (3rd ed), § 11.20, pp 395-396 ; see also *Richards v Tibaldi*, 272 Mich App 522, 539; 726 NW2d 770 (2006). “A bona fide purchaser takes the property free from, and not subject to, the right or interest of that third party.” Cameron, *supra*, § 11.20, p 396.

The trial court concluded that the documentary evidence in this case did not establish that defendants had notice of plaintiff’s interest. “Notice,” in the context of real property law may be actual or constructive. *Richards, supra* at 539. “Constructive notice is notice that is imputed to a person concerning all matters properly of record, whether there is actual knowledge of such matters or not.” Cameron, *supra*, § 11.24, p 399. Plaintiff correctly asserts that a person on notice of a defect in title generally has a duty to investigate:

“When a person has knowledge of such facts as would lead any honest man, using ordinary caution, to make further inquiries concerning the possible rights of another in real estate, and fails to make them, he is chargeable with notice of what such inquiries and the exercise of ordinary caution would have disclosed.” [*Richards, supra* at 539, quoting *Kastle v Clemons*, 330 Mich 28, 31; 46 NW2d 450 (1951).]

Plaintiff argues that the Lagans and Flagstar had constructive notice of the interest held by plaintiff because it was recorded in the chain of title, and therefore they had a duty to inquire into the nature of the interest. Plaintiff essentially contends that had defendants investigated, they would have found that (1) the Associates mortgage stated that it was a “second mortgage,” (2) it contained a provision referring to another document that might be a first mortgage, and (3) the two mortgages to Homegold were recorded seconds apart. Plaintiff argues that given these facts, and because there was no discharge of the \$48,749.22 mortgage, defendants, and particularly Flagstar, as a sophisticated lender, should have recognized the possible interests of a third party, i.e., Homegold’s senior (\$48,749.22) mortgage that was mistakenly recorded after the junior (\$16,248.75) mortgage leading to Justin Lagan’s title. Accordingly, plaintiff reasons, the sole issue is whether defendants’ failure to conduct an inquiry charges them with notice of plaintiff’s alleged first priority interest.

We cannot conclude that plaintiff’s reasoning warrants relief. It is undisputed that the \$16,248.75 mortgage was recorded before the \$48,749.22 mortgage, thereby making the \$16,248.75 mortgage first in priority under the recording statute. “Michigan is a race-notice state, and owners of interests in land can protect their interests by properly recording those interests.” *Richards, supra* at 539, quoting *Lakeside Assoc v Toski Sands*, 131 Mich App 292, 298; 346 NW2d 92 (1983) (citation omitted). As this Court recently reiterated in *Ameriquet Mortgage Co v Alton*, ___ Mich App ___; ___ NW2d ___ (Docket No’s. 264213 and 264214, issued November 28, 2006), slip op pp 5-6, recordation of a mortgage charges third parties with constructive notice and serves to determine lien priority:

Michigan is a recording priority jurisdiction. A mortgage is clearly a conveyance within the meaning of the recording acts. MCL 565.35; *Stover v*

Bryant & Detwiler Improvement Corp of Detroit, 329 Mich 482, 484; 45 NW2d 364 (1951). Accordingly, MCL 565.25 provides, in relevant part:

“(1) In the entry book of mortgages the register shall enter all mortgages and other deeds intended as securities, and all assignments of any mortgages or securities.

* * *

(4) The instrument shall be considered as recorded at the time so noted and shall be notice to all persons except the recorded landowner subject to subsection (2), of the liens, rights, and interests acquired by or involved in the proceedings. All subsequent owners or encumbrances shall take subject to the perfected liens, rights, or interests.”

It is also undisputed that a foreclosure sale based on a first recorded mortgage, i.e., the \$16,248.75, generally extinguishes any claim of title based on a later recorded, or “junior” mortgage, i.e., the \$48,749.22. Given the coupling of these circumstances, i.e., the order of the recording of the mortgages and the foreclosure sale based on the first-recorded mortgage, we cannot conclude that an “honest man, using ordinary caution,” *Richards, supra* at 539, would be on notice to make further inquiries concerning the possible rights of another in the real estate. That is, defendants would have no reason to suspect a defect in the title acquired by Justin Lagan.

To the extent that defendants are further charged with knowledge of the documents themselves, we cannot conclude that, in this case, the documents and their contents warrant charging defendants with notice of the possibility of a third-party interest. Although the \$16,248.75 mortgage included the language “second mortgage” at the bottom of the first page, the \$48,749.22 mortgage likewise included a page with the “second mortgage” notation. And the indirect reference to another document, which “might” be a first mortgage, in one of the provisions in the \$16,248.75 mortgage does not alter our conclusion.

Moreover, plaintiff’s claim is premised on an alleged mistake in the recording of the two mortgages to Homegold in December 1997. “A subsequent purchaser has a right, in the absence of actual notice of the mistake, to rely on the records as showing the exact facts.” *Cameron, supra*, § 11.24, p 401, citing *Barnard v Campau*, 29 Mich 162 (1874).

In general it will not be disputed that one who seeks a benefit from the recording laws must incur all risks of the failure to put his papers duly upon record, whether the fault shall be his own or that of an officer. An equitable construction cannot be put upon such laws by which they may be made to embrace cases not within them, or by means of which they may be made to give constructive notice of things the records do not show. And it has therefore been generally held that if a mistake has been made in recording, by means of which a mortgage appears to be for a less sum than it was in fact given for, or a deed to cover less than was embraced by it, a subsequent purchaser has a right to rely on the record as showing the exact facts. [*Barnard, supra* at 163-164.]

We find the general rule of *Barnard* properly applicable in this case. If there was a mistake in the order of recording the two mortgages to Homegold in 1997, Homegold had ample opportunity to take corrective action, but failed to do so. In the absence of actual notice of the mistake, or facts that otherwise apprised defendants of the mistake, they were entitled to rely on the record as stated, giving the \$16,248.75 mortgage first priority.³

Moreover, as noted in *Barnard*, one who seeks a benefit from the recording laws must incur all risks of the failure to act in accordance with the laws. See *Barnard, supra* at 163. Here, plaintiff did not accept the assignment of the alleged defectively recorded mortgage until 2004, long after the conveyances to defendants occurred and were recorded. Any detriment inured is the result of plaintiff's own failure to act in accordance with the notice of defendants' interests, plainly given in the public records.

Affirmed.

/s/ Kathleen Jansen

/s/ Janet T. Neff

/s/ Joel P. Hoekstra

³ We recognize that a duty of inquiry may apply even in the face of a mistake of record, see *Barnard, supra* at 165; however, we do not find the circumstances of this case sufficient to warrant a finding of such duty.