

STATE OF MINNESOTA

DISTRICT COURT

COUNTY OF ANOKA

TENTH JUDICIAL DISTRICT

Daniel E. Long,
Debra J. Long,

Plaintiffs,

MAR 15 2011

vs.

**ORDER GRANTING
SUMMARY JUDGMENT IN PART AND
DENYING SUMMARY JUDGMENT
IN PART**

Prestige Solutions LLC, Raymond John
Gottwalt, Glen Wachowiak, Washington
Mutual Bank, F.A.,

Defendants.

File No.: 02-CV-10-1235

This matter came on for hearing, the Honorable Barry A. Sullivan, Judge of District Court, presiding, on the 20th day of December 2010, at the Anoka County Courthouse, Anoka, Minnesota. Bryan R. Battina, Esq., Wayzata, Minnesota, appeared on behalf of the Plaintiff. Stephen W. Hance, Esq., Minnetonka, Minnesota, appeared on behalf of the Defendant Glen Wachowiak. David J. Krco, Esq., Minneapolis, Minnesota, appeared on behalf of JP Morgan Chase Bank, N.A.

The matter was before the Court on motions for summary judgment by Plaintiff, Defendant Glen Wachowiak, and JP Morgan Chase Bank.

Based upon the foregoing, upon the arguments the parties, upon all the files, records and proceedings herein, and upon the attached memorandum of law, the Court makes the following:

ORDER

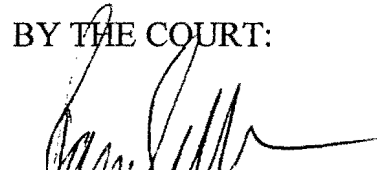
1. Plaintiff's Motion for Summary Judgment is DENIED on all counts.
2. Defendant Glen Wachowiak's Motion for Summary Judgment dismissing counts #3-10 of Plaintiffs' complaint is DENIED.
3. JP Morgan Chase Bank's Motion for Summary Judgment is GRANTED on all counts.
4. The attached memorandum is incorporated by reference.

LET JUDGMENT BE ENTERED

Dated: _____

3/15/11

BY THE COURT:



Barry A. Sullivan
Judge of District Court

JUDGMENT

The above Conclusions of Law and/or Order for Judgment constitute the Judgment of the Court.

Court Administrator
Anoka County, MN

Date: 3-17-11 By: Nykhama Stecker
Deputy

FILED
DISTRICT COURT
ANOKA COUNTY, MN

MAR 17 2011

FILED
DISTRICT COURT
ANOKA COUNTY, MN

MEMORANDUM

Long vs. Prestige Solutions LLC et al; Court File 02-CV-10-1235

Relevant Undisputed Facts

Plaintiffs (“Longs”) are seeking damages from Defendants Prestige Solutions LLC, Raymond Gottwalt, Glen Wachowiak, and Washington Mutual Bank in regards to a foreclosure reconveyance contract. Plaintiffs are also seeking rescission of this contract.

Plaintiffs were the owners of real property located in Anoka County, Minnesota, commonly known as 761 205th Lane Northeast, East Bethel, Minnesota. Plaintiffs defaulted under the terms of an original mortgage assigned to Mortgage Electronic Registration Systems, Inc. (“MERS”). A foreclosure action was commenced. The sheriff’s sale was held on January 11, 2008. MERS acquired the property at the sheriff’s sale for \$206,430.00, subject to a six-month redemption period.

At some point during the redemption period, Plaintiffs were approached by Defendant Gottwalt who allegedly offered Plaintiffs an opportunity to prevent the loss of their property. Gottwalt recommended Defendant Wachowiak to Plaintiffs as an investor who would purchase the property and sell it back to Plaintiffs through a contract for deed. Plaintiffs sold the property to Wachowiak on April 15, 2008, executing a warranty deed to the property that was filed on April 18, 2008, with the Anoka County Registrar of Titles (“ACRT”). Wachowiak financed the purchase by obtaining a mortgage on the property through Defendant Washington Mutual in the amount of \$289,600.00. The mortgage was filed on April 18, 2008, with the ACRT. On April 15, 2008, Plaintiffs and Wachowiak executed a contract for deed filed April 22, 2008, with the ACRT. Defendant JP Morgan Chase Bank, N.A., subsequently acquired the mortgage from Washington Mutual.

Summary Judgment Standard

Summary judgment exists for the purpose of securing a just, speedy, and inexpensive adjudication of a case on its merits where there is no genuine dispute over the material facts of the case, and where either party is entitled to judgment as a matter of law. Minn. R. Civ. P. 56.03; *DLH, Inc. v. Russ*, 566 N.W.2d 60, 69 (Minn. 1997). A material fact is one whose resolution will affect the legal outcome of the case. *Zappa v. Fahey*, 245 N.W.2d 258, 259-60 (Minn. 1976). A genuine dispute is one that is not a “sham or frivolous.” *Highland Chateau, Inc. v. Minnesota Dept. of Pub. Welfare*, 356 N.W.2d 804, 808 (Minn. App. 1984).

If a motion for summary judgment is made, and appropriately supported, the adverse party may not rely on mere averments or denials. Minn. R. Civ. P. 56.05. Instead, the burden shifts to the nonmoving party to “present specific facts showing that there is a genuine issue for trial.” *Id.* The evidence must show more than the existence of a mere “metaphysical doubt” as to material facts. *DLH*, 566 N.W.2d at 71. The court does not weigh the evidence on a motion for summary judgment. *Id.* at 70. The court may, however, take into account whether a piece of evidence lacks probative value, such that reasonable persons could not draw different conclusions from it. *Id.* Summary judgment is mandatory where “there are no facts in the record giving rise to the existence of an essential element of the nonmoving party’s case.” *Nicollet Restoration, Inc. v. City of St. Paul*, 533 N.W.2d 845, 847-48 (Minn. 1995) (quoted in *DLH*, 566 N.W.2d at 71). To avoid summary judgment, the nonmoving party must offer substantial evidence of facts sufficient to permit reasonable persons to draw different conclusions with respect to an essential element of the claim. *DLH*, 566 N.W.2d at 69-70. In determining the existence of a genuine dispute over a material fact, the court must view the evidence in the light most favorable to the nonmoving party. *Grondahl v. Bulluck*, 318 N.W.2d 240, 242 (Minn. 1982). A court may consider as evidence “the pleadings, depositions, answers to interrogatories, and admission on file, together with the affidavits, if any.” Minn. R. Civ. P. 56.03.

Analysis

A. Plaintiffs' Motion for Summary Judgment to find Defendant Wachowiak in violation of Minn. Stat. § 325N.10-18.

Chapter 325N of Minnesota State Statutes regulates mortgage foreclosures as part of an overall consumer protection scheme. §§325N.10 through 325N.18 regulates foreclosure purchasers. A foreclosure purchaser is a person, joint venture, or enterprise that has acted as the acquirer in a foreclosure reconveyance. Minn. Stat. §325N.10, Subd. 4. A foreclosure reconveyance involves the transfer of title to real property by a foreclosed homeowner by creation of a mortgage or other lien or encumbrance that allows the acquirer to obtain title by redeeming the property. Minn. Stat. §325N.10, Subd. 3(1). In addition, a foreclosure reconveyance involves a subsequent conveyance or promise of a conveyance of an interest back to the foreclosed homeowner which allows the homeowner to possess the property. Minn. Stat. §325N.10, Subd. 3(2).

Defendant Wachowiak is a foreclosure purchaser under the statute. He acquired the property from the Plaintiffs while they were in foreclosure and reconveyed the property back to the foreclosed homeowners allowing them to possess the property. Defendant does not deny his classification as a foreclosure purchaser.

Minnesota law requires that every foreclosure purchaser “shall enter into every foreclosure reconveyance in the form of a written contract.” Minn. Stat. §325N.11. That contract “must be fully completed and signed and dated by the foreclosed homeowner and foreclosure purchaser before the execution of any instrument of conveyance of the residence in foreclosure.” Minn. Stat. §325N.11. In addition, “[e]very contract required by section 325N.11 must contain the entire agreement of the parties.” Minn. Stat. §325N.12. Such a contract must also include those terms set forth in Minn. Stat. §325N.12 (1)-(8). The pertinent provisions require the contract to include “a complete description of the terms of any related agreement designed to allow the foreclosed homeowner to remain in the home, such as a rental agreement, repurchase agreement, contract for deed, or lease with option to buy” and a notice of cancellation. Minn. Stat. §325N.12(6)-(7).

The notice of cancellation must be attached in duplicate form to the contract and inform the foreclosed homeowner of her right to cancel any contract with a foreclosure purchaser within five days from which the contract was signed. §325N.13-14. Minnesota Statute §325N.17(f) prohibits a foreclosure purchaser from encumbering any interest in the residence to a third party until the five day cancellation period has fully elapsed.

The Plaintiffs' current claim is prefaced on the argument that Defendant violated Minn. Stat. §325N.12 by failing to draft the parties' agreement in one document. Since the contract did not comply with §325N.12, the parties did not receive their statutory 5 day right to cancel. The Defendant argues that the entire agreement *was* incorporated into a single document and executed on April 2, 2008, between the parties. "It is generally recognized that summary judgment is not appropriate where the terms of a contract are at issue and any of its provisions are ambiguous or uncertain. Under such circumstances the trial court should allow the parties a full opportunity to present evidence of facts and circumstances and conditions surrounding its execution and the conduct of the parties relevant thereto." *Donnay v. Boulware*, 144 N.W.2d 711, 716 (Minn. 1966), *citing, Abdallah, Inc. v. Martin*, 65 N.W.2d 641. The "completeness" of the parties' agreement is at issue in regards to the foreclosure reconveyance. Reasonable persons could draw different conclusions as to whether the Defendant drafted the parties' full agreement into one document. The parties should be allowed to present evidence addressing whether their agreement was actually drafted into one document. If the Defendant did draft the parties' entire agreement into one document, he may not be in violation of Minn. Stat. §325N.10-.18. If the Defendant did not draft the parties' entire agreement into one document, he may be in violation of the statute. The contractual ambiguity is thus an issue of material fact. Since there are issues of material fact regarding the terms of the parties' agreement, summary judgment on Plaintiffs' claim is inappropriate.

B. Plaintiffs' Motion for Summary Judgment to find Defendant Wachowiak in violation of the Minnesota Prevention of Consumer Fraud Act and to void the security interest between Defendants Wachowiak and Washington Mutual

Plaintiffs seek summary judgment on Count 9 of their complaint, finding Defendant Wachowiak in violation of Minn. Stat. § 325F.69. Plaintiffs also seek summary judgment requesting that the security interest between Wachowiak and Washington Mutual be declared void. Plaintiffs' claim under the Consumer Fraud Act is based on language in the foreclosure reconveyance statute which states: "A violation of sections 325N.10 to 325N.17 is considered to be a violation of section 325F.69, and all the remedies of section 8.31 are available for such an action." Minn. Stat. § 325N.18 (2010). Plaintiffs claim this violation should void the security interest between Wachowiak and Washington Mutual. Thus, Plaintiffs' request for summary judgment on these issues is based upon a finding of a violation by Defendant Wachowiak on Plaintiffs' first summary judgment issue. As the court has already held that Plaintiffs' motion for summary judgment on Defendant Wachowiak's alleged violation of §325N.10-.18 is inappropriate, the Court also finds summary judgment inappropriate on these issues.

C. Defendant Wachowiak's Motion for Summary Judgment to Dismiss Count #3 of Plaintiffs' complaint (Violation of foreclosure purchaser statute Minn. Stat. § 325N.10-.18), Count #4 of Plaintiffs' complaint (Rescission of the foreclosure purchaser contract), and Count #9 of Plaintiffs' complaint (Consumer Fraud/Deceptive Trade Practices)

As the Court has already held that granting summary judgment is inappropriate on Plaintiffs' claims that Defendant violated the foreclosure purchaser statute, it would also be inappropriate to dismiss counts 3, 4, and 9 of Plaintiffs' complaint. There are still material issues of fact regarding the parties' agreement and whether Defendant violated the foreclosure purchaser statute. Since these issues are dependent on a determination of whether Defendant violated the foreclosure purchaser statute, summary judgment is inappropriate.

D. Defendant Wachowiak's Motion for Summary Judgment to Dismiss Count #5 of Plaintiffs' complaint (Injunctive Relief)

Defendant Wachowiak's Motion to Dismiss Count #5 is prefaced on a finding that all of Plaintiffs' claims are baseless. Thus, Plaintiffs would not be entitled to injunctive relief. However, the Court is not addressing the issue of whether or not Defendant Wachowiak violated the foreclosure purchaser statute. Therefore, there are still claims remaining in which the Plaintiffs may be entitled to injunctive relief. The Court finds that summary judgment is inappropriate on this issue.

E. Defendant Wachowiak's Motion for Summary Judgment to Dismiss Count #6 of Plaintiffs' complaint (Fraud) and Count #7 of Plaintiffs' complaint (Negligent Misrepresentation)

"The elements of fraud, under Minnesota law, are:

a false representation pertaining to a material past or present fact susceptible of human knowledge, knowledge by the person making the representation of its falsity or assertion of it without knowledge of its truth or falsity, an intention that the other person act on it, or circumstances justifying the other person in so acting, and the other person being in fact reasonably induced to act upon the representation, relying upon it and suffering damage attributable to the misrepresentation."

In re Disciplinary Action Against Strid, 487 N.W.2d 891, 893-94 (Minn. 1992), citing, 8A Dunnell Minn. Digest 2d *Fraud* § 1.00 (3d ed. 1979). The Plaintiffs have not provided any evidence that Defendant Wachowiak made any statement that could be construed as a fraudulent statement under Minnesota law. The facts of this case suggest that Plaintiffs did not even meet Defendant Wachowiak until the day of the closing. In addition, Plaintiffs point to no statements by Defendant Wachowiak as a basis for their fraud claim.

Plaintiffs appear to concede that Defendant Wachowiak did not make any fraudulent representations himself. Plaintiffs argue that false representations by

Defendant Gottwalt should be attributed to Defendant Wachowiak through a theory of joint venture. “A joint venture exists where there is (1) contribution of resources by both parties; (2) joint proprietorship and control over the subject matter of the property engaged in the venture; (3) sharing of profits by express or implied agreement; and (4) an express or implied contract showing joint venture.” *Beehner v. Cragun Corp.*, 636 N.W.2d 821, 832 (Minn. App. 2001), *citing*, *Powell v. Trans Global Tours, Inc.*, 594 N.W.2d 252, 256 (Minn. App. 1999). At this point in the case, it appears that there are still issues of fact in regards to Plaintiffs’ fraud claim. The relationship between Defendants Gottwalt and Wachowiak was such that Gottwalt recommended Wachowiak as the purchaser of the property. The extent of this relationship is still an issue of material fact. If Gottwalt and Wachowiak were involved in a joint venture, then Wachowiak may be liable under a claim of fraud. Reasonable persons could draw different conclusions as to whether Wachowiak was involved in any fraud regarding the reconveyance transaction in this case. The Court finds that summary judgment is inappropriate on this issue.

Plaintiffs’ claim against Defendant Wachowiak for negligent misrepresentation follows a similar argument as the fraud claim. As the court has already decided that the issues of fraud and joint venture are not appropriate for summary judgment at this time, the same is also true for this claim.

F. Defendant Wachowiak’s Motion for Summary Judgment to Dismiss Count #8 of Plaintiffs’ complaint (Unjust Enrichment)

Plaintiffs have also brought a claim against Defendant Wachowiak for unjust enrichment. “To establish an unjust enrichment claim it must be shown that a party has knowingly received something of value, not being entitled to the benefit, and under circumstances that would make it unjust to permit its retention.” *Souhtown Plumbing, Inc. v. Har-Ned Lumber Co., Inc.*, 493 N.W.2d 137, 140 (Minn. App. 1992), *citing*, *In re Stevenson Assocs., Inc.*, 777 F.2d 415, 421 (8th Cir. 1985). “Fraud and mistake are not

the only grounds for recovery under the theory of unjust enrichment. An action for unjust enrichment may be based on failure of consideration, fraud, mistake, and situations where it would be morally wrong for one party to enrich himself at the expense of another.” *Anderson v. DeLisle*, 352 N.W.2d 794, 796 (Minn. App. 1984), *citing*, *Klass v. Twin City Federal Savings and Loan Ass’n*, 291 Minn. 68, 71 (Minn. 1971). The court has already determined that summary judgment is inappropriate on Plaintiffs’ fraud claims. As it appears that Plaintiffs’ unjust enrichment claim would be dependent or factually similar to the fraud claims, summary judgment is also inappropriate on this issue.

G. Defendant Wachowiak’s Motion for Summary Judgment to Dismiss Count #10 of Plaintiffs’ complaint (Equitable Mortgage)

Defendant Wachowiak also seeks summary judgment dismissing Count 10 of Plaintiffs’ complaint, finding the parties to have entered into an equitable mortgage. “In general, “a deed absolute in form is presumed to be, and will be treated as, a conveyance unless both parties in fact intended a loan transaction with the deed as security only.”” *Peterson v. Johnson*, 720 N.W.2d 833, 838 (Minn. App. 2006), *quoting*, *Ministers Life & Cas. Union v. Franklin Park Towers Corp.*, 239 N.W.2d 207, 210 (Minn. 1976). “But, “when the real nature of the transaction between the parties is that of a loan, advanced upon the security of realty granted to the party making the loan, it may be treated as an equitable mortgage, without regard to the actual form of the instrument of conveyance.”” *Id.* at 838-39, *quoting*, *Fraser v. Fraser*, 702 N.W.2d 283, 287 (Minn. App. 2005).

[B]efore a court will hold a deed absolute on its face to be an equitable mortgage, it must appear that both parties so intended ... [because] even if one party actually intended to enter into a mortgage agreement, unless the other party had the same intention, the transaction should not be construed to be an equitable mortgage.

Id. at 839, *quoting*, *Ministers Life*, 239 N.W.2d at 211. “The relevant intention is that of the parties at the time of the conveyance.” *Id.*, *quoting*, *Fraser*, 702 N.W.2d at 288. “To

determine intent, courts look to “the written memorials of the transaction and the attendant facts and circumstances.”” *Id.*, quoting, *Westberg v. Wilson*, 241 N.W. 315, 316 (Minn. 1932).

In this case, there are still issues of material fact as to the parties’ intent at the time of the transaction. Defendant Wachowiak cites deposition testimony from Mr. Long suggesting Mr. Long did not intend the transaction to be an equitable mortgage. However, this quote alone is not sufficient to warrant summary judgment. “The written memorials of the transaction and the attendant facts and circumstances” are also relevant. Each party should be given the opportunity to present facts and evidence suggesting the intent of the parties. Reasonable persons could draw different conclusions as to whether either party intended or did not intend the transaction to be an equitable mortgage. As there are still issues of material fact regarding a potential equitable mortgage, summary judgment is inappropriate on this issue.

H. JP Morgan’s Motion for Summary Judgment to find that the mortgage held by JP Morgan is valid and has priority.

JP Morgan seeks summary judgment validating its mortgage on the property. The property at issue is Torrens property. Torrens property in Minnesota is governed by Chapter 508 of the Minnesota Statutes.

Every person receiving a certificate of title pursuant to a decree of registration and every subsequent purchaser of registered land who receives a certificate of title in good faith and for a valuable consideration shall hold it free from all encumbrances and adverse claims, excepting only the estates, mortgages, liens, charges, and interests as may be noted in the last certificate of title in the office of the registrar...

Minn. Stat. § 508.25. “The purpose of the Torrens system was to create a title registration procedure intended to simplify conveyancing by eliminating the need to examine extensive abstracts of title by issuance of a single certificate of title.” *In re Collier*, 726 N.W.2d 799, 804 (Minn. 2007), quoting, *Hersh Props., LLC v. McDonald’s*

Corp., 588 N.W.2d 728 at 733 (Minn. 1999). “Under the Torrens system, time-consuming and expensive title searches, which characterize the abstract system, are alleviated because the purchaser of Torrens property may, subject to limited exceptions, determine the status of title by inspecting the certificate of title.” *Id.*, citing, *Hersh Props.*, 588 N.W.2d at 733. At the same time, the Torrens Act does not prevent findings of actual notice. *See In re Juran*, 226 N.W. 201, 203 (Minn. 1929). However, the party claiming actual notice has the burden of proving actual notice. *Id.* If a purchaser has actual knowledge of previous unregistered interests, they are no longer considered a good faith purchaser. *See Collier*, 726 N.W.2d at 808.

In this case, Plaintiffs’ contract for deed was filed on April 22, 2008, four days after Washington Mutual filed its mortgage on the property. Thus, at the time Washington Mutual filed its mortgage, it had no recorded notice of the contract for deed. An inspection of the certificate of title, as is required for Torrens property, showed Wachowiak as the fee simple owner of the property. There was no information during the title search that would have shown the Plaintiffs’ as holders of a contract for deed on the property. The Plaintiffs could invalidate the mortgage if it could be shown that Washington Mutual had actual notice of the contract for deed. The facts in this case indicate Washington Mutual had no actual notice. All of the documentation sent to Washington Mutual regarding the mortgage loan states that Wachowiak was purchasing the property from the Longs in fee simple. There is no documentation suggesting that the Longs potentially had a contract for deed on the property. There is no added language suggesting that there could be a contract for deed. From Washington Mutual’s standpoint, it was a basic sale and mortgage of the property. Since Washington Mutual did not have actual or record knowledge of the contract for deed, there are no issues of material fact on this point. The court shall grant summary judgment for JP Morgan on this issue.

I. JP Morgan's Motion for Summary Judgment to find that Plaintiffs are estopped from claiming the Wachowiak deed was not an absolute conveyance of title and estopped from denying validity of the Washington Mutual mortgage.

JP Morgan also argues that the Plaintiffs should be estopped from denying the validity of the mortgage because "the Longs clothed Wachowiak in title empowering him to mortgage the property and the Longs are prevented from disputing that which their own conduct induced." JP Morgan cites the *Esty* case as precedent that "where a party gives an absolute conveyance of title to a grantee and such conveyance is limited by an instrument of defeasance, and the grantee later mortgages the property to a mortgagee who has no notice of the defeasance, the party that originally conveyed title to the property is estopped from denying the validity of the mortgage." *Esty v. Cummings*, 83 N.W. 420, 421 (Minn. 1900). JP Morgan argues that the Longs conveyed the property to Wachowiak, thereby "cloth[ing] Wachowiak with title and empower[ing] him to mortgage the property." JP Morgan additionally cites Minnesota Statutes § 508.51 and the Restatement (Third) on Property as precedent that it should be protected under law as a bona fide mortgagee.

The Court agrees with JP Morgan's arguments regarding its bona fide mortgagee status. As has been previously stated, Washington Mutual was completely unaware of a contract for deed between the Plaintiffs and Wachowiak. The Longs conveyed the property to Wachowiak in fee simple. From the perspective of Washington Mutual, this was a standard property and mortgage transaction. There are no issues of material fact regarding whether the Longs gave Wachowiak the power to place a new mortgage on the property. As such, the Longs are estopped from denying the validity of the Washington Mutual mortgage. The court shall grant summary judgment on this issue.

J. JP Morgan's Motion for Summary Judgment to find the validity and priority of the Washington Mutual mortgage protected by 325N.17(f)(3) because Washington Mutual was a bona fide mortgagee.

JP Morgan additionally argues that the validity and priority of the Washington Mutual mortgage is protected under the foreclosure reconveyance statute. The foreclosure reconveyance statute prevents a foreclosure purchaser from transferring or encumbering the property prior to the time when the foreclosed homeowner may cancel the transaction. Minn. Stat. § 325N.17, subd. 4(f). However, the foreclosure purchaser is prevented only if “no grant of any interest or encumbrance is defeated or affected as against a bona fide purchaser or encumbrance for value and without notice of a violation of sections 325N.10 to 325N.18, and knowledge on the part of any such person or entity that the property was “residential real property in foreclosure” does not constitute notice of a violation of sections 325N.10 to 325N.18.” Minn. Stat. § 325N.17, subd. 4(f)(3). Washington Mutual had no record or actual knowledge of the Plaintiffs’ contract for deed. The foreclosure reconveyance statute protects Washington Mutual’s mortgage as it is a bona fide mortgagee. As the Court has already found Washington Mutual to be a bona fide mortgagee, the Court shall grant summary judgment on this issue as well.

-B.A.S.