STATE OF MICHIGAN

COURT OF APPEALS

AMERIQUEST MORTGAGE COMPANY,

Plaintiff-Appellee,

v

ARKAN D. ALTON,

Defendant-Appellant.

FOR PUBLICATION
November 28, 2006

No. 264213
Oakland Circuit Court
LC No. 2004-058731-CH

ARKAN D. ALTON,

Plaintiff-Appellant,

v

AMERIQUEST MORTGAGE COMPANY,

Defendant-Appellee.

No. 264214
Oakland Circuit Court
LC No. 2004-058944-CH

Before: Fitzgerald, P.J., and Murphy, Talbot, Meter, Fort Hood, Schuette, and Borrello, JJ.

MURPHY, J. (*concurring*).

I respectfully concur with the majority in affirming the ruling in *Ameriquest Mortgage Co v Alton*, 271 Mich App 660; __NWd__ (2006), vacated in part 271 Mich App 801; __NW2d__ (2006). I write separately because, while I agree with the majority that MCL 565.25 precludes application of the doctrine of equitable subrogation in this case, I disagree with the majority's analysis concerning equitable subrogation outside the context of MCL 565.25, and particularly its discussion of the volunteer rule.

I first note that the holding issued by the majority under MCL 565.25 effectively abolishes the doctrine of equitable subrogation in its known form relative to mortgage priority and foreclosure disputes. My reading of the majority opinion leads me to the following summation of the holding. A party may seek equitable subrogation in mortgage priority and foreclosure disputes only if there are allegations of fraud, mutual mistake, or any other "unusual circumstances," in light of MCL 565.25. Presuming that such allegations are made, resort to

equitable subrogation remains unavailable if the party seeking subrogation is deemed a mere volunteer. According to the majority, the attempt by Ameriquest Mortgage Company ("Ameriquest") to invoke equitable subrogation fails because there has been no allegation of fraud, mutual mistake, or any other unusual circumstances relative to Arkan D. Alton ("Alton"), and because Ameriquest and similarly-situated lenders are mere volunteers.

I agree with the majority's analysis under MCL 565.25. "'Equitable subrogation is a legal fiction through which a person who pays a debt for which another is primarily responsible is substituted or subrogated to all the rights and remedies of the other.'" *Hartford Accident & Indemnity Co v Used Car Factory, Inc*, 461 Mich 210, 215; 600 NW2d 630 (1999) (citation omitted); see also *Smith v Sprague*, 244 Mich 577, 579-580; 222 NW 207 (1928) (doctrine applicable where equity demands that a party furnishing money to pay a debt should be substituted for the creditor or in the place of the creditor). Here, application of the doctrine of equitable subrogation would place Ameriquest ahead of Alton in priority and in the position of Equity One, which had been assigned the earlier recorded mortgage held by Franklin Funding, despite the fact that Alton had recorded its mortgage before Ameriquest recorded its mortgage. However, this would be contrary to MCL 565.25.

MCL 565.25 addresses the recordation of deeds, mortgages, levies, and other property-related documents, along with addressing their priorities. MCL 565.25(1) provides, in part, that "the register shall enter all mortgages and other deeds intended as securities" in the entry book of mortgages. MCL 565.25(4) provides:

> 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.* [Emphasis added.]

The language of the statute would dictate that Ameriquest's encumbrance is inferior to Alton's encumbrance with respect to priority. Our Supreme Court made it clear in *Devillers v Auto Club Ins Ass'n*, 473 Mich 562, 590; 702 NW2d 539 (2005), that it is unacceptable for courts to apply equity, absent unusual circumstances such as fraud or mutual mistake, in contravention of a statutory provision that contains clear and unambiguous language. "A court's equitable power is not an unrestricted license for the court to engage in wholesale policymaking[.]" *Id.* It would appear that equitable subrogation does just what *Devillers* proclaims cannot be done by placing the holder of a subsequently recorded mortgage in a position that is superior to the holder of an earlier recorded mortgage for reasons of equity in contravention of the statutory decree. Again, I agree with the majority's assessment of this issue.

Assuming that the facts of a given case preclude application of MCL 565.25 as a bar to a claim of equitable subrogation, i.e., there exists evidence of fraud, mutual mistake, or other "unusual circumstances," I would not agree with the majority's stance that Ameriquest and similarly-situated lenders are mere volunteers and thus cannot utilize the doctrine.

The case law provides that equitable subrogation is a flexible, elastic doctrine of equity and should and must proceed on a case-by-case basis characteristic of equity jurisprudence. *Hartford Accident, supra* at 215; *Atlanta Int'l Ins Co v Bell*, 438 Mich 512, 516 n 1, 521; 475 NW2d 294 (1991) (opinion of BRICKLEY, J); *Eller v Metro Industrial Contracting, Inc*, 261 Mich App 569, 573; 683 NW2d 242 (2004). Even the volunteer rule, stated in full, provides that equitable subrogation does not "inure to a mere volunteer *who has no equities which appeal to the conscience of the court*." *Lentz v Stoflet*, 280 Mich 446, 450; 273 NW 763 (1937); *Walker v Bates*, 244 Mich 582, 587; 222 NW 209 (1928); *French v Grand Beach Co*, 239 Mich 575, 580-581; 215 NW 13 (1927) (emphasis added). The italicized language suggests that, ultimately, the facts of any given case control. In *Stroh v O'Hearn*, 176 Mich 164, 177; 142 NW 865 (1913), the Supreme Court stated that application of equitable subrogation "is proper in all cases . . . where injustice would follow its denial[.]" Of course, this analysis is now somewhat limited by our interpretation of MCL 565.25, and no longer can one rely on simple equitable considerations alone to invoke the doctrine of equitable subrogation, rather there must be a showing of fraud, mutual mistake, or some other "unusual circumstances." In the context of recorded documents under MCL 565.25, we have almost entirely closed the door of equity by restricting the doctrine's application to unusual circumstances such as fraud or mutual mistake, which certainly constitute theories predicated on principles of equity. Nonetheless, because equitable subrogation is to be considered on a case-by-case basis and because equity still plays a role, albeit limited, I conclude that even a mere volunteer should be able to maintain a claim of equitable subrogation if the particular circumstances of any given case are compelling, as long as there exists evidence of unusual circumstances such as fraud or mutual mistake. Indeed, evidence of fraud or mutual mistake in and of itself would seem to beg application of equitable subrogation.

Moreover, Ameriquest and similarly-situated lenders cannot be properly deemed "mere volunteers." Ameriquest did not gratuitously pay off the Equity One loan and mortgage, rather it was protecting its interests by doing so and acting under the closing agreements and documents it had with the mortgagor. In *Lentz, supra* at 451, the Court, rejecting the application of equitable subrogation, ruled, "[W]hen plaintiffs loaned the money they had no interests to protect. It was done without any agreement or understanding that they were to enjoy the fruits of subrogation."

In the cases cited by the majority, there is reference to mere volunteers as being those "showing no interest in the land," *Smith v Austin*, 9 Mich 465, 482 (1862), those lacking a relationship to the property, *Kelly v Kelly*, 54 Mich 30, 47; 19 NW 580 (1884), and those "without any agreement that the security shall be assigned," *Desot v Ross*, 95 Mich 81; 54 NW 694 (1893).

Certainly, Ameriquest showed an interest in the land, had a relationship to the property, and obtained an agreement giving it security in the property. Ameriquest was protecting its interests when it obtained a mortgage to secure its loan and when it paid off the Franklin-Equity One mortgage and obtained a discharge. It has also been stated that equitable subrogation arises in favor of one who pays the debts of another under a legal, equitable, or moral duty. *Beaty v Hertzberg & Golden, PC*, 456 Mich 247, 255; 571 NW2d 716 (1997); *Machined Parts Corp v Schneider*, 289 Mich 567, 575-576; 286 NW2d 831 (1939). Pursuant to the closing documents

between Ameriquest and the mortgagor, there arose a contractual legal obligation to disburse the loan proceeds, in part, to Equity One.

In sum, I agree with the majority that MCL 565.25 precludes application of the doctrine of equitable subrogation in this case, but I disagree with the majority's analysis concerning equitable subrogation outside the context of MCL 565.25, and particularly its discussion of the volunteer rule.

I respectfully concur.

/s/ William B. Murphy