STATE OF MINNESOTA
IN COURT OF APPEALS
A12-1579

Wells Fargo Bank, N. A.,
Respondent,

vs.

Barry Alan Gakin,
Respondent,

Joy Lynn Gakin,
Respondent,

TCF National Bank,
Appellant.

Filed March 11, 2013
Affirmed
Chutich, Judge

Anoka County District Court
File No. 02-CV-11-7066

John F. Nielsen, Bradley N. Beisel, Beisel & Dunlevy, P.A., Minneapolis, Minnesota (for respondent Wells Fargo Bank, N.A.)

Barry A. Gakin, Joy L. Gakin, Coon Rapids, Minnesota (pro se respondents)

Gary B. Bodelson, Minneapolis, Minnesota (for appellant TCF National Bank)

Considered and decided by Peterson, Presiding Judge; Ross, Judge; and Chutich, Judge.

U N P U B L I S H E D O P I N I O N

CHUTICH, Judge

In this mortgage-priority dispute, appellant TCF National Bank (TCF) appeals from the district court's grant of summary judgment in favor of respondent Wells Fargo Bank, N.A. (Wells Fargo). TCF challenges the district court's conclusion that Wells Fargo's mortgage on the subject property took priority over TCF's two mortgages. Because TCF had actual knowledge of the Wells Fargo mortgage when the TCF mortgages closed, we conclude that TCF is not a bona fide purchaser entitled to protection under the recording act, and affirm the grant of summary judgment for Wells Fargo.

FACTS

Respondents Barry and Joy Gakin obtained title to residential real property located in Coon Rapids by warranty deed in 1999. In 2004, the Gakins executed a mortgage on the property in favor of National City Mortgage Company (National City) in the amount of $147,530, and National City recorded the mortgage.

Two years later, the Gakins decided to refinance their home. On May 8, 2006, the Gakins executed a mortgage in the amount of $149,742 in favor of New Freedom Mortgage Corporation (New Freedom). While the Gakins signed the mortgage, note, and other necessary documents on that date, New Freedom did not disburse the funds for the mortgage loan until May 30, 2006. New Freedom then transferred the mortgage to Wells

Fargo on June 6, 2006.[1] National City recorded a release of its mortgage on June 12, 2006.

On May 16, 2006, the Gakins executed two additional mortgages on the property in favor of TCF, securing loans of $30,000 and $35,000. In the TCF loan application profile, TCF noted that the Gakins informed the bank that they had recently "refied" and that TCF had "a copy of the new terms." TCF's loan file also included documents concerning the Wells Fargo transaction, including the first page of the mortgage, the first page of the note, and a settlement statement. TCF's documents also reflect TCF's belief that its mortgages did not have first priority. TCF disbursed the loan funds to the Gakins on May 23, 2006.

TCF recorded its mortgages with the Anoka County Recorder on June 1, 2006, and Wells Fargo recorded its mortgage assignment on June 20, 2006.

In 2011, a dispute arose between the two banks concerning the relative priority of the mortgages on the Gakins' property. Wells Fargo sued TCF and the Gakins, seeking declaratory judgment that its mortgage is prior and superior to TCF's two mortgages. The Gakins did not respond to the lawsuit, and the district court granted default judgment against them in favor of Wells Fargo.

Wells Fargo and TCF brought cross-motions for summary judgment on the issue of priority, and the district court granted Wells Fargo's motion and denied TCF's motion, concluding that because TCF had notice of the Wells Fargo mortgage at the time the

[1] The parties do not dispute that this mortgage transfer placed Wells Fargo into the shoes of New Freedom. For ease of reference, therefore, we refer to the May 8, 2006, transaction as the Wells Fargo mortgage.

Gakins executed the TCF mortgages, Wells Fargo's mortgage took priority. TCF now appeals.

D E C I S I O N

Our review of a district court's grant of summary judgment is de novo. *Weavewood, Inc. v. S & P Home Invs., LLC*, 821 N.W.2d 576, 579 (Minn. 2012). Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that either party is entitled to judgment as a matter of law." Minn. R. Civ. P. 56.03.

On appeal, we review the record to determine whether any genuine material factual issues exist and whether the district court erroneously applied the law. *Dahlin v. Kroening*, 796 N.W.2d 503, 504 (Minn. 2011). Neither party points to any disputed facts that would preclude resolution of the case on summary judgment, and we thus focus on whether the district court erred in applying the law.

The district court concluded that under Minnesota's recording act, the Wells Fargo mortgage had priority over the TCF mortgages. The relevant section of the act provides:

> Every conveyance of real estate shall be recorded in the office of the county recorder of the county where such real estate is situated; and every such conveyance not so recorded shall be void as against any subsequent purchaser in good faith and for a valuable consideration of the same real estate . . . whose conveyance is first duly recorded . . . .

Minn. Stat. § 507.34 (2012). This section protects good-faith purchasers who give valuable consideration, and who first record their interests. *Citizens State Bank v. Raven*

Trading Partners, 786 N.W.2d 274, 278 (Minn. 2010). "A good faith purchaser is someone who gives consideration in good faith without actual, implied, or constructive notice of inconsistent outstanding rights of others." *Id.* (quotations omitted).

TCF concedes that it had actual notice of the Wells Fargo transaction when its mortgages closed on May 16. Under section 507.34, therefore, even though the TCF mortgages were recorded first, Wells Fargo's mortgage takes priority because TCF was not a good faith purchaser—it had actual notice of the Wells Fargo mortgage when it lent money to the Gakins. TCF contends, however, that even though it had notice of Wells Fargo's mortgage, TCF was not a "subsequent purchaser" under section 507.34 because Wells Fargo had no security interest in the property until it disbursed the loan proceeds to the borrowers on May 30.

The recording act defines "purchaser" as "every person to whom any . . . interest in real estate is conveyed for valuable consideration and every assignee of a mortgage . . . ." Minn. Stat. § 507.01 (2012). "The word 'conveyance,' as so used, includes every instrument in writing whereby an interest in real estate is . . . mortgaged." *Id*. TCF argues that Wells Fargo was not a "purchaser" on May 8 because it did not give valuable consideration for the mortgage until May 30, and therefore TCF could not have been a "subsequent purchaser" to Wells Fargo when TCF's mortgages closed on May 16.

No Minnesota caselaw supports TCF's argument that an executed security interest fails to exist before disbursement of the underlying loan proceeds. Instead, TCF relies on a general principle of law that "[b]ecause the security instrument is incident to the debt—i.e., acts as security for the debt—we have long stated that the security instrument can

have no separate or independent existence apart from the debt it secures." *Jackson v. Mortg. Elec. Reg. Sys., Inc.*, 770 N.W.2d 487, 494 (Minn. 2009). In finding TCF's argument unavailing we do not dispute this general principle, but rather conclude that the debt incident to the Wells Fargo mortgage arose on May 8, when the executed documents obligated Wells Fargo to disburse the loan proceeds and obligated the borrowers to make payments on the loan. The bank's promise to pay was the "valuable consideration" required under the recording act. *See Ketterer v. Indep. Sch. Dist. No. 1 of Chippewa Cnty.*, 248 Minn. 212, 222–23, 79 N.W.2d 428, 436 (1956) (stating that valuable consideration is "sufficient if it consists of the performance, *or promise thereof*, which the promisor treats and considers of value to him" (emphasis added)).

The Wells Fargo note does not suggest that the loan disbursement was optional, and simply states that the borrowers promise to pay the debt owed. Further, the borrowers signed a document spelling out their right to cancel the mortgage and note, but nothing in the record suggests that the lender's obligation was optional or that it had the right to unilaterally cancel the transaction. In addition, at closing on May 8, the Gakins received documents concerning distribution of the loan proceeds and a first payment letter, and the mortgage itself shows that the Gakins gave the mortgage on the property on May 8.

TCF cites several sources in support of its argument that a mortgage cannot exist outside of the debt it secures, contending that before loan proceeds have been disbursed, no mortgage exists. Only two of these sources are Minnesota cases, however, and they do not address lien priority. *See McManaman v. Hinchley*, 82 Minn. 296, 298, 84 N.W.

1018, 1018 (1901) (addressing issues surrounding foreclosure and enforceability of a mortgage, and concluding that when debt is no longer valid, the corresponding mortgage is invalid and cannot be foreclosed); *City of St. Paul v. St. Anthony Flats Ltd. P'ship*, 517 N.W.2d 58, 61 (Minn. App. 1994) (stating that "[t]he purpose of a real estate mortgage is to pledge property as security for the payment of a debt," but addressing foreclosure issues rather than lien priority), *review denied* (Minn. Aug. 24, 1994). TCF cites no other Minnesota caselaw to support its position and the sources cited from other jurisdictions are neither precedential nor directly applicable to our analysis here.

Neither Minnesota's recording act nor relevant caselaw requires us to consider the date of loan disbursement in determining lien priority. Reading such a requirement into the law would complicate the law and practice surrounding mortgage issuance, recording, title examination, and foreclosure. The district court therefore did not err in concluding that Wells Fargo's mortgage is prior and superior to TCF's mortgages and granting summary judgment for Wells Fargo.[2]

Affirmed.

[2] Because we conclude that Wells Fargo's mortgage takes priority as a matter of law, we need not address the parties' arguments concerning equitable subrogation.