STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF ANTRIM

THE HUNTINGTON NATIONAL BANK,

Plaintiff,

v

File No. 05-8150-CK
HON. PHILIP E. RODGERS, JR.

JOHN F. SOMERS and DEBRA SOMERS,

Defendants.
_____/

Elizabeth M. Smith (P63010)
Attorney for Plaintiff

Frederick R. Bimber (P30151)
Attorney for Defendants

DECISION AND ORDER DENYING
DEFENDANTS' MOTION FOR SUMMARY DISPOSITION
AND GRANTING PLAINTIFF'S COUNTER-MOTION

This is an action to recover the balance due on a Personal Loan Agreement that was secured by a second mortgage on the Defendants' home. In 2002, the Defendants were in default and this mortgage as well as a senior mortgage was foreclosed. The Plaintiff purchased the property at the foreclosure sale on its mortgage for more than the balance owed under the second mortgage. At the Sheriff's sale on the first mortgage, a third party was the successful bidder. The Plaintiff subsequently redeemed the first mortgage.

During the course of this litigation, the Defendants submitted requests for admissions of fact to the Plaintiff. These requests asked the Plaintiff to admit that (1) the Personal Loan Agreement on which the suit had been brought was secured by a mortgage on the Defendants' home; (2) the Plaintiff had foreclosed that mortgage in 2002; (3) on March 15, 2002 Plaintiff was the purchaser at foreclosure sale of the mortgage for a bid price of $105,000; (4) at the time of the foreclosure sale, $105,000 exceeded the amount owing under the mortgage; and (5) by virtue of the Plaintiff Bank's purchase at the foreclosure sale, the Personal Loan Agreement had been fully paid and satisfied.

The Plaintiff failed to timely respond to the requests. The Defendants brought a motion to have the facts deemed admitted. The Court heard the motion on November 14, 2005 and entered an order holding that the requests to admit were deemed admitted and that any motion by the Plaintiff to set aside those admissions must be brought and heard by December 12, 2005, absent a stipulation by the parties.

By December 15, 2005, the Plaintiff had not brought a motion to set aside the admissions and no stipulation of the parties was filed. The Defendants filed a motion for summary disposition pursuant to MCR 2.116(C)(10) claiming that, based on Plaintiff's admissions, there is no genuine issue of material fact and they are entitled to judgment as a matter of law.

The Defendant responded to the motion and filed a counter-motion for summary disposition, pursuant to MCR 2.116(I)(2), claiming that it added the balance due on the senior mortgage to the balance due on the second mortgage and accelerated the entire amount due prior to the Sheriff's sale and, therefore, was due the combined amount of the outstanding balances on both mortgages, not just the amount due on its second mortgage. This left a deficiency of $34,716.14, plus interest, owing.

The Court heard the arguments of counsel on the cross motions for summary disposition on January 17, 2006 and took the matter under advisement. The Court now issues this written decision and order and, for the reasons stated herein, denies the Defendants' motion and grants summary disposition for the Plaintiff.

STANDARD OF REVIEW

MCR 2.116(C)(10) provides that summary disposition may be entered on behalf of the moving party when it is established that, "except as to the amount of damages, there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law."

The applicable standard of review for a motion for summary disposition brought pursuant to MCR 2.116(C)(10) was set forth in *Smith v Globe Life Ins Co*, 460 Mich 446; 597 NW2d 28 (1999) as follows:

> This Court in *Quinto v Cross & Peters Co*, 451 Mich 358, 362-363; 547 NW2d 314 (1996), set forth the following standards for reviewing motions for summary disposition brought under MCR 2.116(C)(10):

> In reviewing a motion for summary disposition brought under MCR 2.116(C)(10), a trial court considers affidavits, pleadings, depositions, admissions, and documentary evidence filed in the action or submitted by the parties, MCR 2.116(G)(5), in the light most favorable to the party opposing the motion. A trial court may grant a motion for summary disposition under MCR 2.116(C)(10) if the affidavits or other documentary evidence show that there is no genuine issue in respect to any material fact, and the moving party is entitled to judgment as a matter of law. MCR 2.116(C)(10), (G)(4).
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> In presenting a motion for summary disposition, the moving party has the initial burden of supporting its position by affidavits, depositions, admissions, or other documentary evidence. *Neubacher v Globe Furniture Rentals*, 205 Mich App 418, 420; 522 NW2d 335 (1994). The burden then shifts to the opposing party to establish that a genuine issue of disputed fact exists. *Id*. Where the burden of proof at trial on a dispositive issue rests on a nonmoving party, the nonmoving party may not rely on mere allegations or denials in pleadings, but must go beyond the pleadings to set forth specific facts showing that a genuine issue of material fact exists. *McCart v J. Walter Thompson*, 437 Mich 109, 115; 469 NW2d 284 (1991). If the opposing party fails to present documentary evidence establishing the existence of a material factual dispute, the motion is properly granted. *McCormic v Auto Club Ins. Ass'n*, 202 Mich App 233, 237; 507 NW2d 741 (1993).

MCR 2.116(I)(2), upon which the Plaintiff relies, provides:

> If it appears to the court that the opposing party, rather than the moving party, is entitled to judgment, the court may render judgment in favor of the opposing party.

I.

Pursuant to MCR 2.312, a party may serve written requests for admissions on another party during discovery. "Each matter as to which a request is made is deemed admitted unless, within 28 days after service of the request, the party to whom the request is directed serves on the party requesting the admission a written answer or objection addressed to the matter." MCR 2.312(B). Subsection D(1) provides that a matter admitted under this rule is "conclusively established" unless the court on a motion for good cause shown permits withdrawal or amendment of an admission.

In the instant case, the Defendants served written requests for admissions on the Plaintiff and the Plaintiff failed to timely respond. Upon the Defendants' motion, the requests were deemed admitted. The Court nonetheless gave the Plaintiff 14 days in which to file a motion to set aside the admissions. The Plaintiff did not file a motion. Therefore, it is "conclusively established" that (1) the Personal Loan Agreement was secured by a mortgage on the Defendants' home, (2) the Plaintiff foreclosed on that mortgage in 2002; (3) on March 15, 2002, the Plaintiff purchased the property at the foreclosure sale for a bid price of $105,000; (4) $105,000 exceeded the amount owing under the mortgage; and (5) by virtue of the Plaintiff Bank's purchase at foreclosure sale, the Personal Loan Agreement was fully paid and satisfied.

The Defendants claim, based on these facts, that they are entitled to judgment as a matter of law. MCR 2.116(C)(10). The Defendants rely upon the general rule that, when a mortgage holder purchases mortgaged property at a foreclosure sale for an amount equal to or in excess of the mortgage debt, the mortgage debt is satisfied. *Bank of Three Oaks v Lakefront Properties* 178 Mich App 551, 555; 444 NW2d 217 (1989); *Guardian Depositors Corp v Hebb*, 290 Mich 427, 432; 287 NW 796 (1939); *Powers v Golden Lumber Co*, 43 Mich 468, 471; 5 NW 656 (1880). Moreover, the mortgage is extinguished at the time of the foreclosure sale. *New York Life Ins Co v Erb*, 276 Mich 610, 615; 268 NW 754 (1936). However, this is not the general rule that is applicable in the instant case.

The general rule that is applicable here is that the purchase of mortgaged property by the holder of a junior mortgage, at a sale on foreclosure of the senior mortgage, does not extinguish the debt secured by the junior mortgage. *Board of Trustees of the General Retirement System of the City of Detroit v Ren-Cen Indoor Tennis & Racquet Club,* 145 Mich App 318, 322; 377 NW2d 432 (1985), citing Osborne, Mortgages (2d ed), § 274, p. 553 and Anno: Union of title to mortgage and fee in same person as affecting right to personal judgment for mortgage debt, 95 A.L.R. 89, 103-104:

> (b) Foreclosure of senior mortgage.
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> The general rule is that the purchase of mortgaged property by the holder of a junior mortgage, at a sale on foreclosure of the senior mortgage, does not extinguish the debt secured by the junior mortgage.

See also, Osborne, Mortgages (2d ed), § 274, p. 553:

> The general rule is that the purchase of mortgaged property by the holder of a junior mortgage at a sale on foreclosure of the senior mortgage, does not extinguish the debt secured by the junior mortgage. And the same is true even though the foreclosed first mortgage also was owned by the purchasing second mortgagee. However, if the holder of both a junior and senior mortgage forecloses the junior and buys it in on foreclosure sale it is generally held that, in the absence of an agreement to the contrary, the mortgagor's personal liability for the debt secured by the first mortgage is extinguished. The reason given is that on foreclosure sale under a junior mortgage the purchase is subject to the payment of the prior lien with the result that 'the mortgagor has an equitable right to have the land pay the mortgage before his personal liability is called upon' and the purchaser, if he owns or acquires the mortgage, will not be permitted to enforce it against the mortgagor personally. (Footnotes omitted.)

Michigan also follows the general rule of mergers. At law, whenever a greater and lesser estate or a legal and equitable estate coincide in the same person, the lesser or equitable estate is destroyed by merger. Equity, however, will generally prevent a merger if the parties did not intend a merger, and an intent to avoid a merger will ordinarily be inferred where it is in the interest of the person holding the various estates to keep them separate. *Board of Trustees of the City of Detroit, supra* at 326, citing *Quick v Raymond*, 116 Mich 15, 18-19; 74 NW2d 189 (1898). Plaintiff must look to equity to prevent the merger which would be automatic at law. Equity will not be of assistance, however, Plaintiff seeks to avoid a merger to enable it to obtain, in effect, a double recovery.

In *Powers v Golden Lumber Co*, 43 Mich 468, 471; 5 NW 656 (1880), the Court stated:

> While a sale on statutory foreclosure satisfies the debt secured by the foreclosed mortgage to the extent of the proceeds of the sale, and thus far releases the personal obligation, yet **any party redeeming gets such an interest in the land as is necessary to protect him**. And if he is a subsequent encumbrancer, who has advanced the money to protect his security, the **redemption creates no merger of liens**, but those who stand later in the order of title or security must pay the redemption money which he advances for the benefit of their titles, as well as his mortgage which made the advance necessary. These two claims are separate and distinct, and paying one cannot, in good sense or reason, have any effect to release the other. [Emphasis added].

In the instant case, the senior mortgage foreclosure sale occurred prior to the foreclosure sale on Plaintiff's junior mortgage. A third party was the successful bidder. Upon a foreclosure sale, the mortgage debt is considered paid and the mortgage lien discharged. *New York Life Ins Co v Erb*, 276 Mich 610, 615; 268 NW 754 (1936); *Wood v Button*, 205 Mich 692, 701; 172 NW

422 (1919). But, the purchase of the mortgaged property by the Plaintiff who held a junior mortgage does not extinguish the debt secured by the junior mortgage. The Plaintiff, by redeeming, protected its junior mortgage. *Powers v Golden Lumber Co*, 43 Mich 468, 471; 5 NW 656 (1880).

In the meantime, however, the Plaintiff foreclosed on its junior mortgage and was the successful bidder at the Sheriff's sale. As a result of the sale, the Plaintiff acquired fee title to the mortgaged property. If the Plaintiff had no reason to keep the junior mortgage alive, it would merge into the fee and extinguish the debt. *Sylvania Sav Bank Co of Sylvania, Ohio v Turner*, 27 Mich App 640, 644-645; 183 NW2d 894 (1970). Whether this occurred depends on the Plaintiff mortgagee's intention. *Id*. If it is in his interest to preserve his lien separately from the fee, it will ordinarily be concluded that he did not intend to merge the lien into the fee. *Id.* The fact that the Plaintiff subsequently issued a check to redeem the senior mortgage evidences its lack of intent to merge the junior mortgage into the fee and extinguish the debt.

CONCLUSION

In conclusion, even though the facts are deemed admitted because of the Plaintiff's failure to timely respond to requests for admissions, the Defendants are not entitled to judgment as a matter of law. The Defendants' motion for summary disposition should be denied. The Plaintiff's counter motion for summary disposition should be granted and judgment in the amount of $34,716.14, plus interest that has accrued since December 28, 2005, entered in favor of the Plaintiff.

IT IS SO ORDERED.

This decision and order resolves the last pending claim and closes the case.

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HONORABLE PHILIP E. RODGERS, JR.
Circuit Court Judge

Dated: s/ 01/27/06