NOT FOR OFFICIAL PUBLICATION

IN THE COURT OF CIVIL APPEALS OF THE STATE OF OKLAHOMA

DIVISION II

MORTGAGE CLEARING CORPORATION,

Plaintiff/Appellee,

vs.

DEREK M. PRENTICE; SPOUSE OF DEREK M. PRENTICE, if married; UNITED STATES OF AMERICA ex rel. Internal Revenue Service; THE COVES MASTER ASSOCIATION, INC.; OCCUPANT 1 (real name unknown) and OCCUPANT 2 (real name unknown),

Defendants,

AMERICAN NATION BANK,

Defendant/Appellee,

MBROS REAL ESTATE, LLC,

Intervenor/Appellant.

Case No. 120,297

APPEAL FROM THE DISTRICT COURT OF
DELAWARE COUNTY, OKLAHOMA

HONORABLE BARRY V. DENNEY, TRIAL JUDGE

AFFIRMED

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OPINION BY GREGORY C. BLACKWELL, JUDGE:

MBROS Real Estate, LLC, appeals the trial court's grant of summary judgment in favor of American Nation Bank's motion for summary judgment on its foreclosure claim, and the trial court's denial of MBROS's cross-motion for summary judgment on a theory of equitable subrogation. The trial court determined that equitable subrogation was unavailable because the original lender, Mortgage Clearing Corporation (MCC) did not violate any legal duty to MBROS. After review, we affirm the trial court.

BACKGROUND

Although the record submitted in this appeal begins with MCC dismissing its petition without prejudice in 2020, the relevant facts began several years earlier. In March 2012, Derek Prentice mortgaged the subject property for $220,000. MCC eventually came to own the note and mortgage. In November 2016, American Nation obtained judgments against Derek Prentice for $2,155,786.31 (plus interest and expenses) and $66,880.51 (plus interest and expenses), respectively, in two unrelated civil actions. Soon thereafter, American Nation converted the judgments to judgment liens by filing two separate

statements of judgment with the County Clerk in Delaware County, pursuant to 12 O.S. § 706. It is undisputed that these judgment liens have been of record since December 23, 2016, and April 21, 2017, respectively.

On March 16, 2018, MCC filed a foreclosure action against Prentice for default of the March 2012 mortgage. MCC named American Nation, among others, as additional defendants who might have some interest in the property. American Nation appeared and asserted its interest as lienholder. The trial court granted a judgment to MCC and American Nation allowing the foreclosure on October 3, 2018. The judgment lists MCC in the first priority position and American Nation in the second position. Before the property was sold, however, MBROS provided funds to allow Prentice to redeem the property, which he did. MCC then released its judgment and filed a separate "dismissal" on November 13, 2020. Prentice executed a quitclaim deed in favor of MBROS.

On November 17, 2021, American Nation simultaneously filed a motion to set aside the prior foreclosure judgment as to itself and its own motion for summary judgment to foreclose the judgment liens against Prentice.[1] Soon after, MBROS filed a motion to intervene and a countermotion for summary judgment in its favor. MBROS argued that, because of some form of fraud or breach of duty by MCC, MBROS should be equitably subrogated to MCC's first priority position, ahead of American Nation, guaranteeing that MBROS would receive

[1] We note that with MCC's release of its judgment, its dismissal was unnecessary and without legal effect. Further, MCC could not, of course, release American Nation's judgment. American Nation was free to pursue its still-viable judgment and had no need to take any further action to reinstate that judgment, such as vacating the ineffectual dismissal or moving for a redundant summary judgment.

the amount of the MCC mortgage before American Nation could obtain any funds from a forced sale. MCC filed a response to MBROS' motion for summary judgment, arguing that it never owed any duty to MBROS. MBROS also filed a motion to strike MCC's response to MBROS' motion for summary judgment.

After granting American Nation's motion to set aside dismissal and MBROS' motion to intervene, the trial court conducted an argument-only hearing on the pending motions for summary judgment and motion to strike on February 9, 2022. The court granted American Nation's motion for summary judgment and denied both MBROS' motion for summary judgment and motion to strike. MBROS appeals.

STANDARD OF REVIEW

The parties agree to the underlying facts of this case and the summary judgment order decided purely legal questions. As such, the proper standard or review is *de novo. See City of Jenks v. Stone*, 2014 OK 11, ¶ 6, 321 P.3d 179. The granting or refusing of a motion to strike is a matter within the sound discretion of the court. *Fixico v. Ellis*, 1935 OK 562, ¶ 6, 46 P.2d 519 (quoting *Crump v. Lanham*, 1917 OK 270, ¶ 2, 168 P. 43).

ANALYSIS

MBROS argues on appeal that the trial erred in granting American Nation's summary judgment motion because MBROS was entitled to some form of equitable subrogation. MBROS also urges that the trial court erred in not striking MCC's response to MBROS' summary judgment motion because MCC

was not a party to the case at that point. Each contention of error will be addressed in turn.

Subrogation

Oklahoma recognizes two types of subrogation: equitable and contractual. *See U.S. Fidelity and Guar. Co. v. Federated Rural Elec. Ins. Corp.*, 2001 OK 81, ¶ 9, 37 P.3d 828. Contractual subrogation derives from a contract between two parties to pursue reimbursement from a third party in the event of a loss by the party seeking subrogation. *See id.* Equitable subrogation does not arise from a contract, but rather from an implication in equity to prevent an injustice. *Id.* Equitable subrogation is "broad enough to include every instance where one person who is not a mere volunteer, pays a debt for which another is primarily answerable, and which in equity and good conscience should have been discharged by the latter." *Id* (citations omitted).

MBROS essentially argues that the trial court's grant of summary judgment to American Nation in this case is inequitable because it created a windfall for American Nation at the expense of MBROS. Because MCC released the mortgage rather than assigning the mortgage to MBROS, MBROS essentially paid for a property subject to judgment liens at its own expense. MBROS's theory rests on MCC owing a duty to inform MBROS as to American Nation's judgment liens and suggest an assignment of the mortgage to MBROS rather than a pay-off and release. We find no support in the law for this theory.

MBROS, however, never argues nor does the record suggest that MCC ever misled or concealed from MBROS that American Nation had not only perfected

judgment liens on the real property at issue, but a judgment foreclosing those liens—a judgment that, as to American Nation, had not been released or vacated. *See* note 1, *supra.* The record reflects that American Nation's judgment liens were duly recorded prior to the foreclosure proceedings and American Nation's foreclosure judgment of October 3, 2018 was the proceeding from which MBROS obtained the property. These recordings and filings constitute constructive notice to MBROS, indeed, to the world. *See* 25 O.S. § 12 ("Constructive notice is notice imputed by the law to a person not having actual notice"). Additionally, MBROS recorded its quitclaim deed after receiving a *Notice of Lis Pendens* describing American Nation's judgment award. Both the judgment lien (properly recorded in Delaware County) and the judgment (properly filed in foreclosure court records) would had been discovered by MBROS had it performed any due diligence. Although MBROS may not have had actual notice of American Nation's judgment lien, MBROS is charged with constructive notice by virtue of American Nation filing the judgment liens in Delaware County and its judgment in the foreclosure proceedings.

Nevertheless, MBROS argues that the trial court erred in granting summary judgment on the grounds that MCC owed no duty to MBROS regarding these publicly filed liens or foreclosure judgment. At the hearing and in briefing, MBROS cites to numerous state and federal cases to establish that equitable subrogation is available to parties in Oklahoma that have been "defrauded by a debtor or ... received a defective mortgage of some kind." Tr. (2/9/22), pg. 9. *See Jorski Mill & Elevator Co. v. Farmers Elevator Mut. Ins. Co.*, 404 F.2d 143 (10th

Cir. 1968); *Gen. Creditors of Estate of Harris v. Cornett*, 1966 OK 64, 416 P.2d 398; *Lawyers' Title Guaranty Fund v. Sanders*, 1977 OK 210, 571 P.2d 454.

As MBROS has noted, Oklahoma often applies equitable subrogation to cases where parties have been defrauded, or disadvantaged by a breach of contract, in mortgage cases. *See Lawyers' Title Guaranty Fund v. Sanders*, 1977 OK 210, ¶ 6, 571 P.2d 454 ("Sellers breached the contractual duties encompassed by the provisions of the warranty deed and for that reason buyers suffered a loss."). However, as the parties agree, MBROS has not submitted any evidence in the course of litigation to suggest that MCC or American Nation actively defrauded or took advantage of MBROS.

Although subrogation to a mortgage position is available as an equitable remedy under proper conditions, it is not available here, where the party seeking refuge in equity had, but did not take, the opportunity to protect its own legal interests. In applying equitable principles, we must be ever mindful that "equity follows the law"—*aequitas sequitur legem*—but cannot displace it. To apply equitable subrogation here would be to craft a remedy without limits. MBROS essentially argues that MCC had a duty to advise MBROS on the best course of action, *i.e.*, that MCC should have suggested an assignment of the mortgage that would have allowed MBROS to retain a first priority position against American Nation. The court could not, however, use equity to create such a duty where none existed at law. We find no evidence of any relationship—contractual, fiduciary, or otherwise—that would place a duty on MCC to advise MBROS of liens or a judgment that were a matter of public record, or advise MBROS that it

would be more advantageous to seek a purchase and assignment of the mortgage, rather than provide payoff funds. The record reflects that MBROS purchased and took the property with constructive notice of American Nation's judgment liens and judgment. Any harm to MBROS because of the existence of those liens and judgment cannot be laid at the feet of MCC.

Motion to Strike

MBROS also argues that the trial court erred in considering MCC's response to MBROS's countermotion for summary judgment and denying MBROS' motion to strike. As noted, the granting or refusing of a motion to strike is a matter within the sound discretion of the court. *Fixico v. Ellis*, 1935 OK 562, ¶ 6, 46 P.2d 519 (quoting *Crump v. Lanham*, 1917 OK 270, ¶ 2, 168 P. 43). MBROS filed a claim alleging a breach of duty and implicating possible fraud by MCC. Under the circumstances, the trial court was within its discretion to consider MCC's response to MBROS' countermotion for summary judgment, as MCC had a legal interest in a determination that it had committed fraud or breached a contract. Further, upon review of the transcript of the hearing, counsel for MBROS continued to argue that MCC owed some duty to MBROS and that whether that duty was breached was a question of fact that precluded summary judgment. Having invited the trial court to consider the issue below, we cannot find the trial court abused its discretion in failing to strike MCC's response to MBROS' motion for summary judgment. *See Samedan Oil Corp. v. Corporation Comm'n of State of Oklahoma*, 1988 OK 56, ¶ 7, 755 P.2d 664, 668 ("Parties to an action on appeal are not permitted to secure a reversal of a

judgment upon error which they have invited, acquiesced or tacitly conceded in, or to assume an inconsistent position from that taken in the trial court.").

AFFIRMED.

WISEMAN, P.J., and BARNES, J. (sitting by designation), concur.

September 30, 2022