

IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA18-1259

Filed: 5 November 2019

New Hanover County, No. 17-CVS-573

U.S. BANK NATIONAL ASSOCIATION, AS TRUSTEE FOR THE HOLDER OF  
THE SAMI II INC. BEAR STEARNS ARM TRUST, MORTGAGE PASS-THROUGH  
CERTIFICATES, SERIES 2005-12, Plaintiff,

v.

ESTATE OF JOHN G. WOOD, III a/k/a JOHN G. WOOD, JR., ANNETTE F. WOOD,  
EDWARD W. WOOD, and MARY G. WOOD, Defendants.

Appeal by Defendant Mary Wood from orders entered 1 May 2018 and 6 June  
2018 by Judge R. Kent Harrell in New Hanover County Superior Court. Heard in the  
Court of Appeals 9 May 2019.

*Manning Fulton & Skinner P.A., by Robert S. Shields, Jr., for Plaintiff-  
Appellee.*

*Law Office of Susan M. Keelin, PLLC, by Susan M. Keelin, for Defendant-  
Appellant.*

COLLINS, Judge.

Mary Wood (“Defendant”) appeals from (1) an order granting U.S. Bank  
National Association, as Trustee for the Holder of the SAMI II Inc. Bear Stearns Arm  
Trust, Mortgage Pass-Through Certificates, Series 2005-12’s (“Plaintiff”) and denying  
Defendant’s motions for summary judgment made pursuant to North Carolina Rule  
of Civil Procedure 56, and (2) an order granting in part and denying in part

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Defendant's motion for amended findings of fact and an amended order made pursuant to North Carolina Rule of Civil Procedure 52. Defendant contends that the trial court erred by granting Plaintiff summary judgment, and by making various findings of fact and conclusions of law that were unsupported by the evidence and erroneous. We dismiss in part and reverse and remand in part.

***I. Background***

In April 2005, John Wood agreed to purchase real property in Wilmington from Barbara Buchanan for \$878,000. In connection with the contemplated transaction, Alpha Mortgage Corporation ("Alpha") agreed to loan John Wood \$650,000. According to the closing attorney, Alpha conditioned the loan upon (1) the loan being used to pay off an existing lien on the property allegedly held by one of Buchanan's creditors<sup>1</sup> and (2) the execution of a deed of trust on the property that would give Alpha a first-lien security interest therein. In his opinion on title, the closing attorney averred that he represented to Alpha that those conditions would be met, and that Alpha would have a first-lien security interest in the entire property.

Closing took place on 17 June 2005. On that date: (1) according to the closing attorney, Alpha made the \$650,000 loan to John Wood, and the loan proceeds were applied to pay off the existing lien on the property; (2) John Wood executed a promissory note to Alpha for \$650,000 (the "Note"); (3) Buchanan recorded a General

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<sup>1</sup> No documentary evidence regarding any prior lien on the property is reflected in the record.

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Warranty Deed in the New Hanover County Register of Deeds that transferred ownership of the property to John Wood, Annette Wood, Edward Wood, and Defendant; and (4) John Wood and Annette Wood executed a Deed of Trust giving Alpha a security interest in the property, but Edward Wood and Defendant did not.

According to the closing attorney, the Deed of Trust should have been executed by all four subsequent owners of the property, but was executed only by John and Annette Wood due to an error on the attorney's part. As a result, Edward Wood and Defendant took their one-half combined interest in the property unencumbered by any security interest. In December 2008, the Note went into default, and Plaintiff instituted foreclosure proceedings on the property. The foreclosure proceedings were dismissed as inactive in July 2012.

John Wood died in December 2015, and Edward Wood quitclaimed his interest in the property to Defendant in 2016 following their divorce, leaving Annette Wood and Defendant each holding a one-half undivided interest in the property.

On 14 February 2017, Plaintiff filed a verified complaint in New Hanover County Superior Court seeking, *inter alia*, a declaratory judgment quieting title to the property pursuant to N.C. Gen. Stat. §§ 1-254 and 41-10. Plaintiff filed an amended complaint on 24 April 2017.

On 5 June 2017, Defendant filed an answer in which she generally and specifically denied the allegations of the amended complaint, raised a number of affirmative defenses (including the affirmative defense of laches), made a number of

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counterclaims, and moved to dismiss pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(6). On 27 July 2017, Plaintiff replied to Defendant's motion to dismiss and moved to dismiss Defendant's counterclaims pursuant to Rule 12(b)(6). On 19 March 2018, Plaintiff moved for summary judgment pursuant to N.C. Gen. Stat. § 1A-1, Rule 56. Defendant then moved for summary judgment pursuant to Rule 56 on 13 April 2018, and on 16 April 2018 moved for sanctions pursuant to N.C. Gen. Stat. § 1A-1, Rule 37.

On 1 May 2018, the trial court entered an order (1) granting Plaintiff summary judgment on its claim to quiet title to the property under a theory of equitable subrogation, (2) granting Defendant summary judgment as to Plaintiff's other claims, and (3) granting Plaintiff summary judgment as to Defendant's counterclaims. On 10 May 2018, the trial court entered an order which denied Defendant's motion for sanctions but compelled Plaintiff to provide all documents responsive to Defendant's request for production within 30 days.

On 14 May 2018, Defendant filed a motion for amended and additional findings of fact and for an amended order pursuant to N.C. Gen. Stat. § 1A-1, Rule 52(b), essentially asking the trial court to reverse itself and grant summary judgment for Defendant on Plaintiff's claim to quiet title, and asking the court to amend its findings of fact and conclusions of law in the 1 May 2018 order.

On 6 June 2018, the trial court entered an order on Defendant's Rule 52 motion, noting that "[i]n the interest of clarity" it would make certain additional

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findings of fact and conclusions of law, but otherwise denied Defendant's motion, reiterating its ultimate conclusion that it discerned no genuine issues of material fact as to the various claims before it and that the litigants were accordingly entitled to summary judgment as set forth in the 1 May 2018 order.

Defendant timely appealed both the 1 May 2018 and 6 June 2018 orders.

**II. Discussion**

a. Appellate Jurisdiction

As a threshold matter, Defendant's appeal of the 6 June 2018 order and all but one of Defendant's issues presented ask this Court to conduct irrelevant analysis.

Defendant's Rule 52 motion was a request for the trial court to amend its findings of fact and conclusions of law in its 1 May 2018 order granting and denying the parties' competing motions for summary judgment. Likewise, in its second, third, and fourth issues presented, Defendant posits as issues for our review the questions of whether the trial court made erroneous findings of fact and conclusions of law in its two orders. But since this Court reviews a trial court's order granting or denying summary judgment *de novo*, *Variety Wholesalers, Inc. v. Salem Logistics Traffic Servs., LLC*, 365 N.C. 520, 523, 723 S.E.2d 744, 747 (2012), we are to disregard all but the trial court's ultimate decision to grant or deny summary judgment for purposes of our review. See *Hummer v. Pulley, Watson, King & Lischer, P.A.*, 140 N.C. App. 270, 278, 536 S.E.2d 349, 354 (2000) ("A trial judge is not required to make findings of fact and conclusions of law in determining a motion for summary

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judgment, and if he does make some, they are disregarded on appeal.” (citation omitted)); *State v. Price*, 233 N.C. App. 386, 394, 757 S.E.2d 309, 315 (2014) (“Immaterial findings of fact are to be disregarded.” (quotation marks and citation omitted)).

Thus, Defendant’s appeal of the 6 June 2018 order and its second, third, and fourth issues presented all ask this Court to weigh irrelevant matters, and are accordingly dismissed. However, Defendant properly appealed whether Plaintiff was entitled to summary judgment on its claim to quiet title, which the trial court granted based upon the doctrine of equitable subrogation, and we will analyze that issue.

b. Standard of Review

Summary judgment is proper “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 any party is entitled to a judgment as a matter of law.” N.C. Gen. Stat. § 1A-1, Rule 56 (2018). “[T]he party moving for summary judgment ultimately has the burden of establishing the lack of any triable issue of fact[.]” *Pembee Mfg. Corp. v. Cape Fear Constr. Co.*, 313 N.C. 488, 491, 329 S.E.2d 350, 353 (1985), and the evidence is viewed “in a light most favorable to the nonmoving party.” *Hamby v. Profile Prods., LLC*, 197 N.C. App. 99, 105, 676 S.E.2d 594, 599 (2009) (quotation marks and citation omitted). We review an order granting or denying summary judgment *de novo*. *Variety Wholesalers*, 365 N.C. at 523, 723 S.E.2d at 747.

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c. Standing

To establish standing to bring an action to quiet title under N.C. Gen. Stat. § 41-10, a plaintiff must show that the “plaintiff [] own[s] the land in controversy, or ha[s] some estate or interest in it[,]” and that “the defendant [] assert[s] some claim to such land adverse to the plaintiff’s title, estate or interest.” *Wells v. Clayton*, 236 N.C. 102, 107, 72 S.E.2d 16, 20 (1952).

Defendant argues at length that Plaintiff’s failure to provide a materially-complete copy of the Note<sup>2</sup> showing that Plaintiff is the holder of the Note dooms its claim to standing. But Defendant cites to no authority standing for the proposition that a plaintiff’s failure to show that it was the holder of a promissory note executed along with a deed of trust in a real-estate transaction is fatal to the plaintiff’s

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<sup>2</sup> At the hearing on the parties’ competing motions for summary judgment, Plaintiff provided the trial court with a document that Plaintiff represents is a “complete copy of the note[,]” which appears to reflect certain endorsements that are not reflected on the copy of the Note attached to the verified complaint.

We agree with Defendant that the copy of the Note attached to the verified complaint does not show any endorsement by Alpha to any other party, and is therefore insufficient standing alone to show that another party was the holder of the Note. We also grant Defendant’s 27 March 2019 motion to strike the purported “complete copy of the note” because it is an unverified document that is not properly considered in ruling on a motion for summary judgment. N.C. Gen. Stat. § 1A-1, Rule 56(e) (“Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith”); *First Citizens Bank & Trust Co. v. Northwestern Ins. Co.*, 44 N.C. App. 414, 420, 261 S.E.2d 242, 246 (1980) (holding that the trial court erred by considering unsworn documents on a motion for summary judgment); *cf. Precision Fabrics Group, Inc. v. Transformer Sales & Serv., Inc.*, 120 N.C. App. 866, 869, 463 S.E.2d 787, 789-90 (1995) (citing Rule 56(e) in noting that a document offered by a party for purposes of summary judgment “is admissible if properly authenticated” but holding that “[i]n this case [the document offered] was not properly authenticated and thus properly excluded by the trial court.”), *rev’d on other grounds*, 344 N.C. 713 (1996).

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standing to sue to quiet title to the property allegedly covered by the deed of trust, particularly where the plaintiff establishes it is the real party in interest under the deed of trust.

Plaintiff attached the Deed of Trust executed by John and Annette Wood to its verified and amended complaints,<sup>3</sup> which shows Alpha's security interest in the half of the property owned by John and Annette Wood that Plaintiff alleges should have covered the entire property. Plaintiff also alleged that (1) Alpha assigned the Deed of Trust to Plaintiff in 2012, citing to the entry in the New Hanover County Register of Deeds that reflects the assignment to Plaintiff of the Deed of Trust "together with the note(s) and obligation therein described[,]"<sup>4</sup> and (2) Defendant has claimed that it owns half of the property free and clear of Plaintiff's asserted lien.

We accordingly conclude that Plaintiff sufficiently pled standing to sue to quiet title to the property.

d. Equitable Subrogation

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<sup>3</sup> The fact that the original verified complaint was superseded by the amended complaint does not render the attachments thereto unverified, and we treat the verified complaint as an affidavit such that the documents attached thereto may be considered for purposes of ruling on a motion for summary judgment. *See Page v. Sloan*, 281 N.C. 697, 705, 190 S.E.2d 189, 194 (1972) ("A verified complaint may be treated as an affidavit if it (1) is made on personal knowledge, (2) sets forth such facts as would be admissible in evidence, and (3) shows affirmatively that the affiant is competent to testify to the matters stated therein.").

<sup>4</sup> *See* Restatement (Third) of Property: Mortgages § 5.4(b) (1997) ("Except as otherwise required by the Uniform Commercial Code, a transfer of a mortgage also transfers the obligation the mortgage secures unless the parties to the transfer agree otherwise.").



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Plaintiff argued at the hearing on the parties' competing motions for summary judgment that it seeks to quiet title to the property under a theory of equitable subrogation.

The doctrine of equitable subrogation is described as follows:

[A]s a general rule one who furnishes money for the purpose of paying off an encumbrance on real or personal property, at the instance either of the owner of the property or of the holder of the encumbrance, either upon the express understanding or under circumstances from which an understanding will be implied, that the advance made is to be secured by a first lien on the property, will be subrogated to the rights of the prior lienholder as against the holder of an intervening lien, of which the lender was excusably ignorant. . . . In order to invoke the equitable remedy of subrogation it is necessary both that the money should have been advanced for the purpose of discharging the prior encumbrance, and that it should actually have been so applied.

*Peek v. Wachovia Bank & Trust Co.*, 242 N.C. 1, 15-16, 86 S.E.2d 745, 755-56 (1955)

(internal quotation marks and citations omitted).

The amended complaint alleges that (1) “[a]n express condition of the \$650,000 loan made by the Plaintiff to the Defendants to enable them to purchase the property, [was that] the Defendants agreed that the Plaintiff would be granted a deed of trust for the entire property securing their loan[.]” (2) “[t]he proceeds from [Alpha]’s loan to John Wood and Annette Wood were to be used for the purchase of the Property” as described in Plaintiff’s Exhibit D, and (3) “[t]he proceeds . . . were used to pay off and release a first mortgage on the property to First Horizons in the amount [of]

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\$515,732.80.” Plaintiff’s Exhibit D, a U.S. Department of Housing and Urban Development Settlement Statement executed by John Wood and Barbara Buchanan, reflects that \$515,732.80 was applied at closing for “[p]ayoff of first mortgage loan[:] First Horizons[,]” which is corroborated by the closing attorney’s affidavit that he used the funds to pay off the purported prior mortgage. Defendant denied all of these allegations in her answer.

The trial court ruled that Plaintiff established that there exist no genuine issues of material fact and that Plaintiff is entitled to quiet title to the property via the doctrine of equitable subrogation as a matter of law. In her brief on appeal, Defendant argues that the doctrine of equitable subrogation is unavailable to Plaintiff because Alpha, Plaintiff’s predecessor-in-interest, did not furnish money to extinguish any debt owed by John Wood, the borrower, but rather to extinguish the debt owed by Buchanan, the owner of the real property Alpha’s money was used to purchase. In essence, Defendant argues that equitable subrogation cannot apply unless the lender is providing money to a borrower to extinguish a prior debt owed by that borrower, e.g., in a refinancing transaction.

Neither of the parties cite to any controlling authority expressly holding that equitable subrogation is or is not available to a lender who has furnished money to the purchaser of real property on the condition that (1) the money be used to extinguish debt owed by the seller of the property so that (2) the lender gains a first-

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position lien over the property, and we are aware of no such authority. We are persuaded, however, that equitable subrogation can apply in such a context.

Equitable subrogation is a creature of equity whose “basis is the doing of complete, essential, and perfect justice between all the parties *without regard to form*, and its object is the prevention of injustice.” *Journal Publ’g Co. v. Barber*, 165 N.C. 478, 487-88, 81 S.E. 694, 698 (1914) (emphasis added). While distinguishable in that it concerned a refinancing transaction, our decision in *Bank of N.Y. Mellon* instructs that where a lender furnishes money on the condition that it be used to give the lender a first-position lien over a parcel of real property but an attorney’s error causes the defendant to receive title to a fraction of the parcel unencumbered by the lender’s lien, the defendant may be subjected to the anticipated lien via equitable subrogation. *Bank of N.Y. Mellon v. Withers*, 240 N.C. App. 300, 303, 771 S.E.2d 762, 765 (2015). And while not controlling, we agree with many of our sister states, as well as with federal courts applying North Carolina law, that have held that equitable subrogation is not limited to the context of refinancings and can apply in the context of purchase transactions such as the transaction here at issue. *See, e.g., Gibson v. Neu*, 867 N.E.2d 188, 200 (Ind. Ct. App. 2007) (“we must disagree that equitable subrogation applies only in refinance situations”); *Sourcecorp, Inc. v. Norcutt*, 258 P.3d 281, 288 (Ariz. Ct. App. 2011) (“equitable subrogation should not be precluded on the basis that the party seeking subrogation is a purchaser of property who has paid the existing encumbrance in connection with the purchase”); *In re Project Homestead*,

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*Inc.*, 374 B.R. 193, 208 (Bankr. M.D.N.C. 2007) (“The Trustee also argues that equitable subrogation is not available in these proceedings because the borrowed funds were not used to pay an obligation of the borrowers (i.e., the Purchasers), but instead were used to pay obligations of the Debtor. Neither *Peek* nor the other North Carolina decisions involving equitable subrogation support such a limitation. . . . Although not strictly a refinancing, this is precisely the type of situation that, under the broad equitable principles recognized in the North Carolina cases, the remedy of equitable subrogation may be invoked by the new lender in order to claim the rights formerly held by the old lender under the old lender’s deed of trust.”).

We therefore hold that the doctrine of equitable subrogation can apply in the context of a purchase transaction, and conclude that the trial court did not commit an error of law by denying Defendant summary judgment. Our holding should not be construed as a ruling that Plaintiff has established that it is entitled to be equitably subrogated in this case. As explained below, we conclude that summary judgment was improperly granted by the trial court. At trial, Plaintiff must convince the factfinder that it falls within the ambit of *Peek* and other decisions setting forth what a plaintiff must prove in order to avail itself of the doctrine of equitable subrogation.

## e. Laches

Defendant raised the affirmative defense of laches in her answer and counterclaims, and argues on appeal that a genuine issue of material fact regarding

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whether Plaintiff's delay in bringing suit constitutes laches renders erroneous the trial court's grant of summary judgment to Plaintiff.

"The doctrine of laches is designed to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared." *Stratton v. Royal Bank of Can.*, 211 N.C. App. 78, 88-89, 712 S.E.2d 221, 230 (2011) (internal quotation marks and citation omitted). A party seeking to invoke the affirmative defense of laches must show: (1) a delay of time resulting in some change in the condition of the property or in the relations of the parties; (2) the delay was unreasonable and worked to the disadvantage, injury, or prejudice of the party seeking to invoke the doctrine of laches; and (3) the party against whom laches is sought to be invoked knew of the existence of the grounds for the claim sought to be barred. *See MMR Holdings, LLC v. City of Charlotte*, 148 N.C. App. 208, 209-10, 558 S.E.2d 197, 198 (2001). The mere passage of time is insufficient to constitute laches, and the delay necessary to constitute laches depends upon the facts and circumstances of each case. *Id.*

Defendant argues that summary judgment was inappropriate because she has asserted that Plaintiff's delay in bringing this action is unreasonable and has prejudiced her both financially and in her ability to make her defense. Specifically, Defendant argues that Plaintiff's delay has (1) prevented her from selling her share of the property, to which she allegedly made certain improvements during the period of delay, and (2) made unavailable testimony from John Wood (who is deceased) and

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closing attorney Price (who does not recall the transaction) that she might use to defend against Plaintiff's claim. While conceding that it knowingly delayed bringing the action for more than eight years, Plaintiff argues that Defendant's allegations of prejudice are insufficient to prevent summary judgment because (1) the property has allegedly increased in value during the period of the delay, (2) the alleged improvements cost little, and (3) Defendant lived on the property rent-free during the period of the delay.

We are unpersuaded by Plaintiff's arguments, and agree with Defendant that there exist genuine issues of material fact as to whether Defendant suffered prejudice because of Plaintiff's delay in bringing suit. The factfinder must accordingly decide at trial whether such prejudice, if proven, allows Defendant to invoke the doctrine of laches to bar Plaintiff's cause of action. *See Cieszko v. Clark*, 92 N.C. App. 290, 298, 374 S.E.2d 456, 461 (1988) (holding that where "issues of fact remain as to whether plaintiffs' delay in bringing this action was unreasonable and whether defendants were prejudiced by the delay[,] summary judgment was improper).

"Summary judgment provides a drastic remedy and should be cautiously used so that no one will be deprived of a trial on a genuine, disputed issue of fact. The moving party has the burden of clearly establishing the lack of triable issue, and his papers are carefully scrutinized and those of the opposing party are indulgently regarded." *Koontz v. City of Winston-Salem*, 280 N.C. 513, 518, 186 S.E.2d 897, 901 (1972). Given the drastic nature of the judgment here appealed from, we conclude

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that the trial court erred by granting Plaintiff summary judgment, and remand to the trial court to require Plaintiff to prove that it is entitled to quiet title to the real property, and to give Defendant the opportunity to prove otherwise, at trial.

***III. Conclusion***

Because (1) Defendant's second, third, and fourth issues presented and her appeal from the trial court's 6 June 2018 order on her Rule 52 motion concern the trial court's findings of fact and conclusions of law underpinning its ultimate decision to grant Plaintiff summary judgment on its claim to quiet title to the property and (2) we disregard all but the trial court's ultimate decision on an appeal from an order granting a motion for summary judgment, we dismiss those aspects of Defendant's appeal. But because Plaintiff has not shown that there exist no genuine issues of material fact regarding its claim to quiet title via the doctrine of equitable subrogation, we conclude that the trial court erred by granting Plaintiff's motion for summary judgment on that claim in its 1 May 2018 order, and we reverse that ruling and remand to the trial court for further proceedings consistent with this opinion.

DISMISSED IN PART AND REVERSED AND REMANDED IN PART.

Judge DIETZ concurs.

Judge MURPHY dissents by separate opinion.

MURPHY, Judge, dissenting.

I respectfully dissent from the Majority as it is not within our authority to expand the doctrine of equitable subrogation into the context of purchase transactions like that at issue in this case.

The Majority correctly notes that there is no controlling authority to support its decision that equitable subrogation is available in the context of the underlying agreement in this case. As there is no precedent affirmatively allowing us to apply the equitable subrogation doctrine in favor of Plaintiff, doing so would allow lenders to rely upon equitable subrogation in a way in which they previously could not. However, as our State’s intermediate appellate court, “this Court is not in the position to expand the law. Rather, such considerations must be presented to our Supreme Court or our Legislature[.]” *Shera v. N.C. State Univ. Veterinary Teaching Hosp.*, 219 N.C. App. 117, 126, 723 S.E.2d 352, 358 (2012). “This Court is an error-correcting court, not a law-making court.” *Id.* at 127, 723 S.E.2d at 358.

Like the Majority, I would conclude the trial court erred in granting summary judgement in Plaintiff’s favor. However, I would reverse the trial court’s order and hold that Defendant is entitled to summary judgment in her favor. The Majority’s opinion is an expansion of our State’s common law and I respectfully dissent.