COURT OF APPEALS DECISION DATED AND RELEASED

June 10, 1997

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 96-3034

STATE OF WISCONSIN **IN COURT OF APPEALS DISTRICT III**

LYMAN LUMBER OF WISCONSIN, INC., A MINNESOTA CORPORATION,

PLAINTIFF-RESPONDENT,

V.

FIRST FEDERAL SAVINGS BANK LACROSSE-MADISON,

DEFENDANT-
THIRD PARTY PLAINTIFF-APPELLANT,

GJOVIK DESIGN AND CONSTRUCTION, INC. AND JASON B. GJOVIK,

DEFENDANTS,

MERLE D. GJOVIK AND COUNTY CONCRETE CORPORATION,

THIRD PARTY DEFENDANTS.

APPEAL from a judgment of the circuit court for Eau Claire County: ERIC J. WAHL, Judge. *Affirmed.*

Before Cane, P.J., LaRocque and Myse, JJ.

PER CURIAM. In this foreclosure proceeding, the dispute concerns the priority of two mortgages. First Federal Savings Bank LaCrosse-Madison appeals a judgment determining that its mortgage is subordinate to the mortgage of Lyman Lumber of Wisconsin, Inc. First Federal argues that (1) it is entitled to reformation of its mortgage pursuant to § 706.04, STATS., and (2) the trial court erroneously based its denial of relief on the unauthorized alteration of Lyman's deed and First Federal's mortgage. Because the trial court reasonably exercised its discretion to deny First Federal equitable relief, based on its agreement with Lyman Lumber, we affirm the judgment.

Merle Gjovik and his son, Jason Gjovik, were building contractors who sometimes operated as a partnership and sometimes as a corporation, Gjovik Design and Construction, Inc. Merle approached Lyman, a lumberyard, which owned a vacant residential lot, for the purpose of building a "spec" house to show in a local "Parade of Homes." Lyman agreed to sell the lot for $9,000 and furnish construction materials worth $18,000. Lyman also agreed to finance the lot and materials for six months interest free, secured with a note and mortgage. Lyman deeded the lot to Gjovik Design and Construction, Inc., which gave back a mortgage. Additional financing in the sum of $67,500 was to be obtained through First Federal.

Mike Brown, credit manager at Lyman, testified that he had two or three telephone conversations with Karen Overhulser, First Federal's residential branch manager during which they reached an agreement concerning the

disbursement of First Federal mortgage loan proceeds. He testified that First Federal agreed not to disburse the last $27,000 payout to the Gjoviks, but to hold the sum in reserve for six months. If Lyman had not yet been fully paid, First Federal would then pay Lyman. In turn, First Federal would record its mortgage first, and Lyman's mortgage would be recorded second. Brown testified that the Gjoviks approved of these arrangements; however, Brown did not reduce the agreement to writing.

The Gjoviks applied for a loan at First Federal in their individual names, rather than in the name of their corporation. Consistent with their loan application, First Federal had them sign the note and mortgage personally, rather than as officers of their corporation. It obtained the deed and mortgage from Lyman and, apparently not noticing the discrepancies in the names on the documents, recorded the deed, First Federal's mortgage, and Lyman's mortgage in that order.

In January 1995, Brown called Overhulser and asked whether the loan proceeds were available. She informed him that all funds had been fully disbursed. At the trial to the court, however, Overhulser denied that she agreed to reserve mortgage loan proceeds for Lyman, and did not recall erroneously advising Brown in January 1995 that all loan proceeds had been disbursed. All funds had not been disbursed by January 1995; the record demonstrates that First Federal made disbursements as follows: on June 8, 1994, $18,700; on June 24, $40,000; and on May 12, 1995, $8,800.

In March 1995, First Federal was notified by the title insurance company that it would not issue a title policy to the bank because the lot was not titled in the name of the mortgagors. First Federal decided to rectify the problem

by altering the original deed from Lyman and the First Federal mortgage from the Gjoviks, with the approval of Merle Gjovik. At the direction of bank representatives, one of its employees altered the deed by adding "Merle D. Gjovik, President" and "Jason B. Gjovik, Secretary/Treasurer," to the deed from Lyman to Gjovik Design and Construction, Inc. She also corrected a misspelling of the word "construction" and added the language: "This deed is being re-recorded to correct the name of the grantee" and re-recorded the deed.

The bank employee also altered the mortgage from the Gjoviks to First Federal, by changing the name of the mortgagor to Gjovik Design and Construction, Inc., and crossing out the words "a married man" and inserting titles "President" and Secretary/Treasurer" following Merle Gjovik and Jason Gjovik. She also added "This mortgage is being re-recorded to correct the name of the mortgagor." The mortgage was then re-recorded. Lyman was not notified of these alterations to the documents.

The model home was not sold, and the Gjoviks abandoned it. No sums were paid on the two mortgages, and Lyman instituted this foreclosure proceeding. First Federal counterclaimed for reformation of its mortgage and a determination that its status was superior to all other interests.

The trial court resolved the Brown's and Overhulser's conflicting testimonies concerning the loan disbursement agreement in Lyman's favor. It concluded that Brown's testimony sounded more "sensible." It declined to grant First Federal's claim for equitable relief. The trial court entered judgment accordingly and First Federal appeals the judgment.

First Federal argues that it is entitled to relief pursuant to § 706.04, STATS., which provides: "A transaction which does not satisfy one or more of the

requirements of s. 706.02 may be enforceable in whole or in part under doctrines of equity, provided all of the elements of the transaction are clearly and satisfactorily proved and, in addition:

> (1) The deficiency of the conveyance may be supplied by reformation in equity; or
> (2) The party against whom enforcement is sought would be unjustly enriched if enforcement of the transaction were denied ….[1]

The decision to grant equitable relief is addressed to trial court discretion. ***Zinda v. Krause,*** 191 Wis.2d 154, 175, 528 N.W.2d 55, 62 (Ct. App. 1995). We uphold the trial court's exercise of discretion if the record shows a process of reasoning dependent on facts of record and a conclusion based on a logical rationale founded upon proper legal standards. ***State v. Shanks,*** 152 Wis.2d 284, 289, 448 N.W.2d 264, 266 (Ct. App. 1989).

"Where a party's culpable negligence in a business transaction results in its own harm, a court of equity may leave the parties as it finds them." ***State Bank v. Christophersen,*** 93 Wis.2d 148, 160, 286 N.W.2d 547, 553 (1980). "'The rule requires reasonable caution and prudence in the transaction of business, and is deeply imbedded in our jurisprudence. The abrogation of the rule would tend to encourage negligence and to introduce uncertainty and confusion in all business transactions.'" ***Id.*** (quoting ***Conner v. Welch,*** 51 Wis. 431, 443, 8 N.W. 260, 265 (1881) (citation omitted)).

First Federal argues that § 706.02, STATS., applies because the elements of the transaction are clearly identified. It contends that Lyman and the

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[1] The parties do not contend that subsec. (3) applies.

Gjoviks agreed that First Federal's mortgage would be superior to Lyman's. It argues that neither Merle nor Jason informed First Federal that they had taken title to the lot in the corporate name. It argues that the mutual mistake or formal defect in its mortgage document results in the instrument not reflecting the parties' intent and, as a result, this case cries out for equitable reformation.

We are unpersuaded. First Federal's argument fails to address Brown's testimony concerning the existence of Lyman's agreement with First Federal to hold back funds to pay Lyman's second mortgage. Brown testified that absent such an agreement, Lyman would never have agreed to subordinate its mortgage to First Federal. Although Overhulser disputed Brown's testimony, the trial court made a credibility assessment to which we owe deference. Section 805.17(2), STATS. Because the trial court accepted Brown's version of the transaction, First Federal's claim that all the elements of its version of the transaction are clearly and satisfactorily proved must be rejected.

First Federal also argues that Lyman will be unjustly enriched if the court denies First Federal its priority status. It argues that Lyman would be the recipient of the benefit of First Federal's mistake by being elevated from second to first mortgagee and that this would be inequitable. We disagree. Unjust enrichment occurs when it would be inequitable for the defendant to accept or retain the benefit without paying its value. *See* ***Puttkamer v. Minth***, 83 Wis.2d 686, 689, 266 N.W.2d 361, 363 (1978). Here, it is undisputed that Lyman paid out over $27,000 in land and materials without being compensated. The trial court found that First Federal agreed to reserve loan proceeds to pay Lyman at the end of six months, and implicitly found that First Federal failed to carry out its agreement.

Under these circumstances, no unjust enrichment results to Lyman being afforded a priority security position. The equities are equal; if the trial court were to reform the defective mortgage despite First Federal's failure to carry out its disbursement agreement, then Lyman would be in the same inequitable position that First Federal finds itself. Embracing different facts, our supreme court has observed that generally, "when equities are equal the legal title will prevail." ***Kurowski v. Retail Hardware Mut. Fire Ins. Co.,*** 203 Wis. 644, 647, 234 N.W. 900, 901 (1930). Here, the trial court was entitled to conclude that the equities being equal, the parties' legal interests would prevail. Because the record discloses a reasonable basis for the trial court's decision, we do not disturb it on appeal.

Nevertheless, First Federal argues that the trial court erred by "focusing" on First Federal's acts of altering the deed and its mortgage. It argues that it merely attempted to conform the mortgage instrument to the parties' original intent and that the facts of this case are not nearly as egregious as those in ***Security Pacific Nat'l Bank v. Ginkowski,*** 140 Wis.2d 332, 410 N.W.2d 589 (Ct. App. 1987). In ***Ginkowski,*** we affirmed the trial court's decision in a foreclosure proceeding to grant equitable reformation of a mortgage document. The mortgagor failed to execute the document and testified that he never intended to do so. ***Id.*** at 334, 410 N.W.2d at 591. An employee of the mortgagee forged the mortgagor's signature and subsequently assigned the mortgage to Security Pacific National Bank, which later foreclosed. ***Id.*** The trial court found that the mortgagor had received the loan and intended to sign the mortgage, and granted Security Pacific equitable relief. ***Id***. at 337***,*** 410 N.W.2d at 592. Because Security Pacific never asserted the forgery by its predecessor interest as a basis for relief, the trial court concluded that the "clean hands" doctrine did not bar relief. ***Id.*** at 339-40, 410 N.W.2d at 593. For relief to be denied a plaintiff in equity under the

"clean hands" doctrine, "it must clearly appear that the things from which the plaintiff seeks relief are the fruit of *its own* wrongful or unlawful course of conduct." ***Id***. at 339, 410 N.W.2d at 593 (quoting ***S & M Rotogravure Serv. v. Baer***, 77 Wis.2d 454, 467, 252 N.W.2d 913, 919 (1977) (emphasis added)).

We conclude that First Federal's reliance on ***Ginkowski*** is misplaced. Here, the trial court did not apply the "clean hands" doctrine to the bank's decision to alter and re-record the documents. The court pointed out on numerous occasions that both parties were careless and, with respect to First Federal's attempts to rectify the matter, stated: "I'm not critical of the decision. I think that's a decision trying to make things as they should have been and as they would have been. But I think that in doing so … that changed the priorities and the rules in law." The court did not hold that the altered mortgage was invalid, but granted the parties judgments of foreclosure, leaving "the parties as it finds them." ***State Bank***, 93 Wis.2d at 160, 286 N.W.2d at 553.

Also, ***Ginkowski*** addressed a wrongful act by the foreclosing bank's predecessor in interest, not by the foreclosing bank itself. But, in any event, it is unnecessary to distinguish or harmonize ***Ginkowski*** because the issue before us is addressed to trial court discretion. "[A] trial court in an exercise of its discretion may reasonably reach a conclusion which another judge or another court may not reach, but it must be a decision which a reasonable judge or court could arrive at by the consideration of the relevant law, the facts, and a process of logical reasoning." ***Hartung v. Hartung,*** 102 Wis.2d 58, 66, 306 N.W.2d 16, 20-21 (1981). With this deferential standard of review in mind, we conclude that the trial court reasonably declined to exercise its discretionary powers to grant equitable relief.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.