

STATE OF MICHIGAN  
MACOMB COUNTY CIRCUIT COURT

TALMER BANK AND TRUST,  
Plaintiff,

vs.

Case No. 2013-4480-CK

BATH CITY BISTRO, INC., DEBORAH  
R. BOONE, PAUL R. BOONE, JULIE  
J. GIBBONS, PATRICK J. GIBBONS III,  
aka PATRICK GIBBONS, and STEPHANIE  
SEVIN,

Defendants,

JP MORGAN CHASE BANK, N.A.,

Intervening Defendant/Cross-Plaintiff/  
Counter-Defendant,

v

TALMER BANK AND TRUST,

Counter-Defendant,

and

PAUL R. BOONE and DEBORAH R. BOONE,

Cross-Defendants.

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OPINION AND ORDER

Intervening Defendant/Cross-Plaintiff/Counter-Defendant JPMorgan Chase Bank, N.A. (“Chase”) has filed a motion for summary disposition. Plaintiff has filed a response and requests that the motion be denied.

*Facts and Procedural History*

The instant motion involves a mortgage priority dispute involving real property commonly known as 28010 Lansdowne Drive, Harrison Township, MI 48085 (“Subject Property”).

On or about March 2, 2001, Paul R. Boone and Deborah R. Boone (collectively, the “Boones”) acquired the Subject Property for \$92,500.00. The Subject Property was conveyed to the Boones via a warranty deed dated March 2, 2001, and recorded on March 21, 2001.

On or about April 26, 2002, the Boones entered into a line of credit with Bank One, N.A. (“Bank One”) for a sum not to exceed \$80,000.00 (“Bank One First Loan”). The Bank One Equity Loan was formalized via a promissory note in the amount of the loan, which was secured by a mortgage encumbering the Subject Property (“Bank One First Mortgage”). The Bank One First Mortgage was recorded on May 17, 2002.

On or about January 25, 2002, Defendant Bath House Bistro, Inc. borrowed \$850,000.00 from Plaintiff’s successor in interest, Community Central Bank (“CCB”) (“First CCB Loan”). The First CCB Loan was guaranteed by the United States Small Business Administration and individually by the Boones. The First CCB Loan was secured by a mortgage encumbering the Subject Property (“Plaintiff First Mortgage”). The First CCB Mortgage was recorded on September 13, 2002.

On or about August 27, 2002, the Boones borrowed \$376,000.00 from Bank One (“Bank One Second Loan”). The Bank One Second Loan was secured by a mortgage encumbering the Subject Property (“Bank One Second Mortgage”). The Bank One Second Mortgage was recorded on October 2, 2002.

On or about August 20, 2002, Bank One subordinated the priority of the Bank One First Mortgage to the Bank One Second Mortgage. The subordination was recorded on October 8, 2002.

On or about April 27, 2004, Bank One agreed to refinance the Bank One First Loan and the Bank One Second Loan. Bank One and the Boones entered into two transactions: a loan for \$333,700.00 and a line a credit not to exceed \$120,000.00 (“Bank One Refinance Loans”). The Bank One Refinance Loans were secured by two mortgages, which were both dated April 27, 2004 and recorded on May 26, 2004 (collectively, the “Bank One Refinance Mortgages”).

The proceeds of the Bank One Refinance Loans were used to pay off the Bank One First Loan and Bank One Second Loan and to discharge the Bank One First Mortgage and Bank One Second Mortgage. The Bank One First Mortgage was discharged on May 19, 2004 and the Bank One Second Mortgage was discharged on June 2, 2004.

On April 8, 2004, CCB discharged the First CCB Mortgage (“CCB Discharge”). The CCB Discharge was recorded on May 26, 2004.

On May 14, 2004, CCB re-recorded the First CCB Mortgage (“Second CCB Mortgage”).

Chase is the successor in interest to Bank One’s interest in the Bank One Refinance Mortgages. Plaintiff is the successor in interest to CCB’s interest in the Second CCB Mortgage.

The instant motion addresses the parties’ dispute as to the priority of the Bank One Refinance Mortgages and the Plaintiff’s Second Mortgage. On October 20, 2014, the Court held a hearing on in connection with the pending summary disposition motions on this issue. At the conclusion of the hearing the Court took the matter under advisement.

#### *Standards of Review*

A motion under MCR 2.116(C)(10) tests the factual support of a claim. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). In reviewing such a motion, a trial court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties in the light most favorable to the party opposing the motion. *Id.* Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law. *Id.* The Court must only consider the substantively admissible evidence actually proffered in opposition to the motion, and may not rely on the mere possibility that the claim might be supported by evidence produced at trial. *Id.*, at 121.

#### *Arguments and Analysis*

The instant dispute involves Chase's assertion that the Bank One Refinance Mortgages have first and second priority over the Second CCB Mortgage. In this matter it is undisputed that the First Bank One Mortgage was recorded first, the First CCB Mortgage was recorded second and that the Second Bank One Mortgage was recorded third. Accordingly, it is undisputed that under Michigan's race-notice scheme the First CCB Mortgage originally had priority over the Second Bank One Mortgage. The dispute in this case involves how the priority was altered by the events following the recording of the Second Bank One Mortgage.

In their motion and reply Chase asserts that the CCB discharged the First CCB Mortgage in order to allow the Boones to close the Bank One Refinance Notes and Bank One Refinance Mortgages, and to allow the Bank One Refinance Mortgages to hold first and second priority encumbrances over the Subject Property. In support of their position, Chase relies on the affidavits of Deborah and Paul Boone in which they testified that the purpose of obtaining a discharge of the First CCB Mortgage was to allow Chase to have the first and second priority encumbrances on the Subject Property. *See* Chase's Exhibits K and L. Chase also relies on the

testimony of Allen Zabkowski, the officer of CCB that oversaw CCB's loans to the Boones. Mr. Zabkowski testified that CCB agreed to discharge the First CCB Mortgage and to re-record it as the Second CCB Mortgage in order to allow Chase to hold the first two priority liens on the Subject Property by operation of the Bank One Refinance Mortgages. *See* Chase's Exhibit M. While it is undisputed that the mortgages at issue were not recorded in the order necessary to accomplish the parties' intent, the Court is convinced that equity requires that the Bank One Refinance Mortgages be placed in the first and second priority position. While not specifically raised by Chase, it appears to be arguing that the doctrine of equitable estoppel should be invoked to properly reflect the intent of the parties.

Equitable estoppel may arise where (1) a party, by representations, admissions, or silence intentionally or negligently induces another party to believe facts, (2) the other party justifiably relies and acts on that belief, and (3) the other party is prejudiced if the first party is allowed to deny the existence of those facts." *Lakeside Oakland Development, LC v H & J Beef Co*, 249 Mich App 517, 527; 644 NW2d 765 (2002). In this case, the Boones and Mr. Zabkowski testified that CCB promised to take the steps necessary to allow the Bank One Refinance Mortgages to hold the first and second priority. *See* Chase's Exhibits K, L and M. Plaintiff has failed to provide any contradictory evidence. It is also clear that Chase relied on CCB's promise by discharging the First and Second Bank One Mortgages and entering into the First One Refinance Loans. Finally, Chase would be prejudiced if Plaintiff were permitted to benefit from its predecessor in interest's failure to keep its representation. Accordingly, the Court is convinced that all three elements needed to invoke equitable estoppel are satisfied in this case. Accordingly, Chase's motion must granted.

#### *Conclusion*

Based upon the reasons set forth above, Intervening Defendant/Cross-Plaintiff/Counter-Defendant JPMorgan Chase Bank, N.A.'s motion for summary disposition is GRANTED. The Court hereby holds that the Bank One Refinance Mortgages held by Chase have priority over the CCB Second Mortgage held by Plaintiff under the doctrine of equitable estoppel. This *Opinion and Order* neither resolves the last claim nor closes the case. See MCR 2.602(A)(3).

IT IS SO ORDERED.

/s/ John C. Foster  
JOHN C. FOSTER, Circuit Judge

Dated: October 27, 2014

JCF/sr

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