

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**March 17, 2016**

Diane M. Fremgen  
Clerk of Court of Appeals

**NOTICE**

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

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

**Appeal No. 2015AP728**

**Cir. Ct. No. 2014CV1289**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT II**

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**FAIR FINANCE CORP.,**

**PLAINTIFF-APPELLANT,**

**V.**

**ROOMATES, LTD., C/O A.E. FRIEDMAN AND ELAINE FRIEDMAN  
AND ARTHUR E. FRIEDMAN,**

**DEFENDANTS,**

**KATHLEEN MERTZ,**

**DEFENDANT-RESPONDENT.**

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APPEAL from a judgment of the circuit court for Racine County:  
FAYE M. FLANCHER, Judge. *Affirmed.*

Before Lundsten, Higginbotham and Sherman, JJ.

¶1 PER CURIAM. This appeal arises out of a foreclosure action initiated by Fair Finance Corporation against Roomates, LTD and Kathleen Mertz. Fair Finance appeals summary judgment in favor of Mertz, who has an interest in the property at issue here under a prior, unrecorded land contract. Fair Finance contends the circuit court erred in determining that Mertz's interest in the property is superior to Fair Finance's interest. For the reasons discussed below, we conclude that Fair Finance has failed to show that summary judgment was improper.

### **BACKGROUND**

¶2 The history surrounding the property at issue in this case, which is located in Waterford, Wisconsin, is complicated. In the 1990s, Mertz entered into a land contract for the purchase of the property with the property's then owners. The contract provided that the outstanding balance under the contract was to be paid in full on or before February 28, 1997. Two five-year contract extensions were entered into in 1997 and 2005.

¶3 In July 1997, title to the property was obtained by new owners, who financed their purchase with a mortgage from Lincoln Community Bank (n/k/a Lincoln State Bank). In August 1997, those owners transferred title to the property by warranty deed to Roomates.

¶4 In 2004, Lincoln State Bank filed an action against Roomates and its predecessor in interest seeking to foreclose on the property, and filed a lis pendens on the property. In the course of the foreclosure action, Lincoln State Bank learned of Mertz's interest in the property and petitioned the circuit court to amend the complaint on the basis that Mertz occupies the property and "has, or may have, an interest in the subject premises pursuant to an alleged land contract." The

petition was granted and Lincoln State Bank filed an amended complaint naming Mertz as a defendant and alleging that Mertz “may have an interest in the subject real estate by reason of an alleged unrecorded land contract” between Mertz and Roomates.

¶5 While the Lincoln State Bank foreclosure proceedings were pending, Roomates obtained financing from Fair Finance to satisfy the mortgage held by Lincoln State Bank, in exchange for a mortgage on the property. Roomates defaulted on that mortgage and in June 2014, Fair Finance filed this action seeking to foreclose on the property.

¶6 In its complaint, Fair Finance alleged that Fair Finance is the current holder of a promissory note executed by Roomates, which was secured by a mortgage on the property, and that Roomates had defaulted on the mortgage and note. The complaint alleged that Roomates is the owner of the Waterford property and that Mertz is the tenant of the Waterford property. Mertz answered that she has an interest in the Waterford property as the vendee under an unrecorded land contract, which was executed prior to Fair Finance’s mortgage, and she asserted as an affirmative defense that her interest in the property as a vendee under the land contract is higher in priority than any interest Fair Finance has in the property.

¶7 Both Fair Finance and Mertz moved the circuit court for summary judgment. Fair Finance argued that it is entitled to summary judgment because, pursuant to WIS. STAT. § 706.08(1)(a) (2013-14),<sup>1</sup> its interest in the property is

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<sup>1</sup> WISCONSIN STAT. § 706.08(1)(a) provides that “every conveyance that is not recorded as provided by law shall be void as against any subsequent purchaser, in good faith and for a valuable consideration, of the same real estate ... whose conveyance is recorded first.”

(continued)

superior to Mertz's prior interest because Fair Finance took its mortgage interest for valuable consideration and in good faith. Fair Finance also argued that its mortgage interest is superior to Mertz's interest because at the time the foreclosure action was filed the land contract had expired, and the terms of the land contract state that the contract "is subordinate to any present or future mortgages" on the property. Mertz argued that she is entitled to summary judgment because Fair Finance had notice of her interest in the property and therefore did not take its interest in the property in good faith. Mertz also argued that Fair Finance may not rely on the land contract to establish that its interest in the property has priority over her interest.

¶8 The circuit court granted Mertz's motion and denied Fair Finance's motion. The court concluded that Fair Finance had notice of Mertz's interest in the property and, therefore, did not take its interest in good faith under WIS. STAT. § 706.08(1)(a). The court also concluded that Fair Finance may not rely on the land contract to establish the superiority of its interest in the property. Fair Finance appeals.

## DISCUSSION

¶9 We review a grant of summary judgment de novo. *Mach v. Allison*, 2003 WI App 11, ¶14, 259 Wis. 2d 686, 656 N.W.2d 766. A party is entitled to summary judgment if there are no disputed issues of fact and the party is entitled to judgment as a matter of law. *Id.* In deciding whether there are factual disputes, we consider whether more than one reasonable inference may be drawn from

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All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

undisputed facts; if so, the competing reasonable inferences may constitute genuine issues of material fact. See *Hennekens v. Hoerl*, 160 Wis. 2d 144, 162, 465 N.W.2d 812 (1991). Whether an inference is reasonable and whether more than one reasonable inference may be drawn are questions of law. *Id.*

¶10 Fair Finance contends the circuit court erred in granting summary judgment in favor of Mertz for two reasons. Fair Finance contends that under WIS. STAT. § 706.08(1)(a), its interest in the property is superior to Mertz’s interest because it took its interest in good faith and for valuable consideration. Fair Finance also contends that the terms of the land contract establish that its interest in the property is superior to Mertz’s interest. We address, and reject, each argument in turn below.

¶11 Fair Finance argues that the circuit court erred in not determining that under WIS. STAT. § 706.08(1)(a), its interest in the property has priority over Mertz’s prior, but unrecorded, interest in the property.

¶12 WISCONSIN STAT. § 706.08(1)(a) “codif[ies] ... the common law bona-fide-purchaser doctrine.” *Associates Fin. Servs. Co. of Wisc., Inc. v. Brown*, 2002 WI App 300, ¶9, 258 Wis. 2d 915, 656 N.W.2d 56. Section 706.08(1)(a), like the common law bona fide purchaser doctrine, provides that a subsequent mortgage has priority over a prior unrecorded interest in property, but only if the mortgagee obtained its interest in the property in good faith and for valuable consideration. *Grosskopf Oil, Inc. v. Winter*, 156 Wis. 2d 575, 584, 457 N.W.2d 514 (Ct. App. 1990). We have explained that “the purpose of this section is ... ‘to protect a purchaser who relies on the record and is a purchaser in good faith and for valuable consideration.’” *Associates Fin. Servs. Co. of Wisc.*, 258 Wis. 2d 915, ¶9 (quoted source omitted).

¶13 It is undisputed that in 1992, Mertz entered into a land contract with the then owner of the property, but that the contract was never recorded. Because Mertz's prior interest was unrecorded, under WIS. STAT. § 706.08(1)(a), Fair Finance's subsequent recorded interest is superior to Mertz's interest if Fair Finance took its mortgage interest in the property good faith and for valuable consideration. The only dispute in this case is whether Fair Finance obtained its interest in good faith. "A purchaser or mortgagee in good faith is one without notice of existing rights in [the] land." *Grosskopf*, 156 Wis. 2d at 584. Sources of notice include recording and public records, as well as the land itself where the mortgagee is able "to discover by observation the rights which arise outside the recording system by virtue of possession or use." *Id.* (quoted source omitted).

¶14 Upon our review of the summary judgment submissions, we agree with the circuit court that there is no genuine factual dispute that Fair Finance had notice of Mertz's interest in the property.

¶15 Before the execution of the mortgage and note at issue here, Lincoln State Bank filed an amended complaint naming Mertz as a defendant and alleging that Mertz occupied the premises and may have an interest in the property pursuant to an unrecorded land contract. At the time Lincoln State Bank filed its foreclosure action, it filed a lis pendens, giving notice of the action. *See* WIS. STAT. § 810.10. Prior to closing on the loan to Roomates, a title insurance policy was issued, which contained a notation that Lincoln State Bank had initiated a foreclosure action on its mortgage and that a lis pendens had been filed for that action. As noted by the circuit court, the summary judgment submissions do not indicate that the lis pendens had been released at the time the Fair Finance mortgage and note were executed.

¶16 There is no factual dispute that Fair Finance had notice, by virtue of the lis pendens filed by Lincoln State Bank which was noted in the title insurance commitment, of the Lincoln State Bank foreclosure action. The purpose of a lis pendens is to inform a potential subsequent purchaser that a lawsuit is pending that may affect the marketability of title to the property. *See Hailey v. Zacharias*, 39 Wis. 2d 536, 537-38, 159 N.W.2d 667 (1968) (the purpose of the statute requiring the filing of a lis pendens when an action affecting real property is instituted is to give legal notice to persons not having knowledge of the proceedings.) Fair Finance argues that the lis pendens did not provide notice of Mertz’s interest in the property because the lis pendens did not identify Mertz as a named defendant. However, had Fair Finance acted upon the information provided in the title commitment, it would have learned that Mertz was a defendant in that action and that it was alleged that Mertz had a potential interest in the property. Accordingly, we conclude that Fair Finance had at least constructive notice of Mertz’s interest in the property. Because Fair Finance had notice of Mertz’s interest in the property, Fair Finance did not take its interest in good faith and, therefore, does not have a priority of title over Mertz under WIS. STAT. § 706.08(1)(a).<sup>2</sup>

¶17 Fair Finance contends that even if its interest in the property is not superior to Mertz’s interest under WIS. STAT. § 706.08(1)(a), Fair Finance’s interest is superior because a provision in the land contract indicates that the contract had expired by the time the foreclosure action was initiated and because a

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<sup>2</sup> In order to have priority under Wisconsin’s “Notice-Race’-type” recording statute, one must be a bona fide purchaser. An individual who has either actual or constructive notice of an unrecorded prior interest is not a bona fide purchaser. *See Bump v. Dahl*, 26 Wis. 2d 607, 612-13, 133 N.W.2d 295 (1965).

provision in the contract states that the contract “is subordinate to any present or future mortgages on [the Waterford property].”

¶18 Under Wisconsin law, only a party or a third-party beneficiary of a contract has standing to enforce the terms of a contract. *Goossen v. Estate of Standaert*, 189 Wis. 2d 237, 249, 525 N.W.2d 314 (Ct. App. 1994). There is no dispute that Fair Finance was not a party to the contract. Accordingly, in order to enforce the contract, Fair Finance must have established that it was a third-party beneficiary of the contract.

¶19 Fair Finance does not argue that it was a third party beneficiary of the contract. Rather, it argues that it should be able to rely on the land contract, despite the fact that it was neither a party to nor a third party beneficiary of the contract, in order to “call attention to the deficiencies in” Mertz’s affirmative defense. Fair Finance argues that in order for Mertz to prove that her interest in the land contract was superior to its own interest in the property, Mertz had to “pro[ve] that a valid contract exists.” Fair Finance argues that because its ability to foreclose on the property “was inextricably intertwined with the validity and effect of the land contract, Fair Finance [should have been permitted] to point out deficiencies with the land contract.”

¶20 We acknowledge that the copy of the land contract before this court on summary judgment indicates that the balance had become due prior to the date that Fair Finance initiated this foreclosure action, which is the basis for Fair



Finance’s assertion that the land contract had “expired.”<sup>3</sup> We also acknowledge that the contract contains a provision stating that the “contract is subordinate to any present or future mortgages on ... [the Waterford property].” However, Fair Finance’s argument that it should be permitted to rely on these provisions to establish that its interest in the property is superior to Mertz’s interest is in essence an argument that it should be able to enforce the provisions in the land contract.

¶21 Whether Fair Finance’s argument is that it has some equitable right to rely upon the contract because Mertz’s reliance upon it, or is simply the proposition that it can somehow rely upon the contract as a third party, Fair Finance provides no authority to support its argument. If there is some reason why its argument should be persuasive, Fair Finance fails to identify it. Accordingly, we conclude that Fair Finance cannot rely on the land contract to prove that Mertz’s interest in the property is not superior to its own interest.

¶22 Mertz moves this court, pursuant to WIS. STAT. § 809.25(3), for an order awarding her costs, fees and reasonable attorney’s fees because this appeal is frivolous. We conclude that the appeal is not frivolous and deny Mertz’s motion.

## CONCLUSION

¶23 For the reasons discussed above, we affirm.

*By the Court.*—Judgment affirmed.

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<sup>3</sup> To the extent that Fair Finance is arguing that because the final payment had become due, Mertz no longer had the rights of a purchaser under the contract, Fair Finance is incorrect. See, e.g., *Steiner v. Wisconsin Am. Mut. Ins. Co.*, 2005 WI 72, ¶¶21-43, 281 Wis. 2d 395, 697 N.W.2d 452 (explaining that a vendee’s equitable title in property does not cease to exist at the end of the term of the land contract).

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

