



*Every month I summarize the most important probate cases in Michigan. Now I publish my summaries as a service to colleagues and friends. I hope you find these summaries useful and I am always interested in hearing thoughts and opinions on these cases.*

## **PROBATE LAW CASE SUMMARY**

**BY:** Alan A. May



Alan May is a shareholder who is sought after for his experience in guardianships, conservatorships, trusts, wills, forensic probate issues and probate. He has written, published and lectured extensively on these topics.

He was selected for inclusion in the 2007 through 2010 issues of *Michigan Super Lawyers* magazine featuring the top 5% of attorneys in Michigan and is listed in the 2011 compilation of *The Best Lawyers in America*. He has been called by courts as an expert witness on issues of fees and by both plaintiffs and defendants as an expert witness in the area of probate and trust law. He is listed by Martindale-Hubbell in the area of Probate Law among its Preeminent Lawyers.

He is a member of the Society of American Baseball Research (SABR).

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**DT:** May 24, 2011

**RE:** Mortgage Electronic Registration Systems Inc. & Bank of New York v  
Denise C. Parks Irrevocable Trust, by Walter Sakowski, Trustee, et al  
STATE OF MICHIGAN COURT OF APPEALS

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### **MAJOR LEAGUE LORE:**

As with an earlier review, I am giving you some alternative teams:

**QUADRAPEDS**

Moose Skowren  
Ox Brovia  
Kitty Bransfield  
John "Big Cat" Mize  
Rabbit Maranville

vs.

**WINGED WARRIORS**

Eagle Eye Beckley  
Red Bird  
Billy Martin  
Partrige Adams  
Robin Yount

Re: Mortgage Electronic Registration Systems Inc. & Bank of New York v  
Denise C. Parks Irrevocable Trust, by Walter Sakowski, Trustee, et al  
–continued–

Charlie Basset  
Foxy Grandpa Bannon  
Jimmy Coker  
Deerfoot Barclay  
Pooch Barnhart  
Lyman Lamb  
Baby Bull Cepeda  
Nellie Fox

Chick Autry  
Goose Gossage  
Solly Drake  
Turkey Mike Donlon  
Hawk Dawson  
Chick Cuccinello  
Frank “The Crow” Crosetti  
Ron “The Penguin” Cey

**REVIEW OF CASE:**

Reference Files: Power to Convey  
Co-trustees

A Trust was established. There were two Co-trustees. Both trustees had to act to make a valid transfer. One granted a mortgage while the other was kept in the dark and never notified by the mortgagor. The mortgagor assigned. The assignee foreclosed.

The Court of Appeals allowed that a mortgagor take no greater title than the mortgagee had but cites the third party dealer section of EPIC MCL 700.7817 which says:

“With respect to a third person dealing with a trustee or assisting a trustee in the conduct of transaction, the existence of a trust power and its power exercise by the trustee may be assumed without inquiry. The third person is not bound to inquire whether the trustee may act or is properly exercising the power. A third person, without actual knowledge that the trustee is exceeding a trust power or improperly exercising it, is fully protected in dealing with the trustee as if the trustee possessed and properly exercised the power the trustee purports to exercise. A third person is not bound to assure the proper application of trust property paid or delivered to the trustee.”

The court does have the power to find one law superior in application to another. But, query, does the superior statute apply? I agree with the court that the assignee of the mortgage is a third party, but the application of the statute applies to third parties dealing with a trustee. In the instant case, this third party didn’t deal with the trustee they dealt with their assignor, the assignee dealt with the mortgagee and then the assignee foreclosed. If the assignee had called the trustee and the trustee said “yes I have power,” in my opinion, might be different, but it doesn’t look like there were any dealings between them.

AAM:jv:Doc:688783

Not Reported in N.W.2d, 2011 WL 1438420 (Mich.App.)  
(Cite as: 2011 WL 1438420 (Mich.App.))

Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT  
RULES BEFORE CITING.

UNPUBLISHED

Court of Appeals of Michigan.  
**MORTGAGE ELECTRONIC REGISTRATION  
SYSTEMS, INC.**, Plaintiff,

and  
**Bank of New York, Trustee for Certificate Holders  
of CWABS 2004-11, Plaintiff/  
Counter-Defendant/Appellee,**

v.  
**DENISE C. PARKS IRREVOCABLE TRUST,**  
by **Walter SAKOWSKI, Trustee, Defendant/  
Third-Party Plaintiff/Counter-Plaintiff-Appellant,**

and  
**Debra A. Parks, Defendant/  
Counter-Plaintiff/Cross-Plaintiff/Appellant,**

and  
**William Hall, a/k/a/ William Parks, Defendant/  
Counter-Plaintiff/Cross-Defendant/Appellant,**

and  
**Teresa C. Warren, Third-Party Defendant.**

Docket No. 296151.

April 14, 2011.

Before: DONOFRIO, P.J., and CAVANAGH and  
STEPHENS, JJ.

PER CURIAM.

\*1 Defendant William Sakowski, as trustee for the Denise C. Parks Irrevocable Trust, appeals as of right from the trial court's opinion and order granting summary disposition in favor of plaintiff Bank of New York ("BONY") pursuant to MCR 2.116(C)(10) and quieting title to disputed property in favor of BONY. We affirm.

This case involves real property that was

formerly owned by the Denise C. Parks Irrevocable Trust, which was established in 2000. Denise is severely incapacitated. Debra Parks, who is Denise's sister, and William Sakowski were appointed co-trustees for the trust. In 2003, Debra forged Denise's signature on a quitclaim deed that conveyed the property to Debra and "William Parks," as a married couple. However, Debra and William were not actually married and William's actual last name was Hall. Debra and William later granted a mortgage to Pathway Financial, which was subsequently assigned to Royal Mortgage. It is undisputed that some of the mortgage proceeds were used for expenses unrelated to the property or Denise's benefit. Debra and William later executed a quitclaim deed conveying the property back to the trust.

In 2004, Debra Parks, as trustee, executed another quitclaim deed conveying the property to herself individually. Sakowski, the other co-trustee, did not participate in or consent to this transaction. Debra thereafter obtained a new mortgage loan from Mortgage Electronic Registration Systems, Inc. ("MERS"), as nominee for Michigan Fidelity Acceptance Corporation. The MERS mortgage proceeds were used to pay off the Royal Mortgage loan, and to pay other expenses, including delinquent property taxes of approximately \$275. The parties dispute whether the various disbursements inured to the benefit of the trust or trust property.

After Debra defaulted on her mortgage loan, MERS brought a foreclosure action and obtained a sheriff's deed. On June 23, 2008, MERS executed a quitclaim deed conveying its interest in the property to BONY, which thereafter brought this action to quiet title. Sakowski challenged the validity of BONY's property interest, claiming that the prior conveyances to Debra were invalid and, accordingly, the resulting mortgage interests from which BONY derived its interest in the property were also invalid. BONY and Sakowski filed cross-motions for summary disposition pursuant to MCR

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2.116(C)(10). The trial court granted BONY's motion and quieted title in its favor.

This Court reviews a trial court's decision on a motion for summary disposition de novo. *Ward v. Titan Ins Co*, 287 Mich.App 552, 554; 791 NW2d 488 (2010). A motion under MCR 2.116(C)(10) tests the factual sufficiency of a complaint. *Dextrom v. Wexford Co*, 287 Mich.App 406, 415; 789 NW2d 211 (2010). A court must examine the documentary evidence presented by the parties and, drawing all reasonable inferences in favor of the nonmoving party, determine whether a genuine issue of material fact exists. *Id.* at 415-416. Summary disposition is properly granted when the proffered evidence fails to establish a genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Ward*, 287 Mich.App at 554.

\*2 We agree that the June 2004 transfer of the property from Debra, as trustee, to herself individually, was not valid, because co-trustee Sakowski did not participate in or consent to the transaction, and Debra did not have the authority to act unilaterally on behalf of the trust. Further, because the conveyance was invalid, the resulting MERS mortgage was also invalid. It is well established that a mortgage can give the mortgagee no greater rights or interests than those held by the mortgagor. Accordingly, whatever defeats a mortgagor's title also defeats the lien of the mortgagee. 26 Michigan Law & Practice 2d, Real Property, § 756, p 263, citing *Sloan v. Holcomb*, 29 Mich. 153 (1874).

MCL 555.21 provides that "[w]hen [a] trust shall be expressed in the instrument creating the estate, every sale, conveyance, or other acts of the trustees, in contravention of the trust, shall be absolutely void." Further, former MCL 700.7406(4)<sup>FN1</sup> provided:

FN1. Pursuant to 2009 PA 46, MCL 700.7406 was repealed and replaced by MCL 700.7817, effective April 1, 2010.

(4) Subject to subsections (1) to (3), all other acts and duties shall be performed by both of the trustees if there are 2 or by a majority of the trustees if there are more than 2. A trustee who has not joined in exercising a power is not liable to a beneficiary or another person for the consequences of the exercise of that power. A dissenting trustee is not liable for the consequences of an act in which the dissenting trustee joins at the direction of the other trustees, if the dissenting trustee expressed dissent in writing to a co-trustee at or before the time of joinder.

In this case, the trust did not authorize either co-trustee to act without the consent of the other. Accordingly, Debra's unilateral conveyance of the property from the trust to herself was invalid, and her ensuing mortgage of the property also was invalid.

Nonetheless, we agree with the trial court that any fraud affecting the validity of the prior transactions did not preclude it from quieting title in the property in favor of BONY. Former MCL 700.7404<sup>FN2</sup> provided:

FN2. The substance of MCL 700.7404 is now covered by MCL 700.7912, which was added by 2009 PA 46, effective April 1, 2010.

With respect to a third person dealing with a trustee or assisting a trustee in the conduct of a transaction, the existence of a trust power and its proper exercise by the trustee may be assumed without inquiry. The third person is not bound to inquire whether the trustee may act or is properly exercising the power. A third person, without actual knowledge that the trustee is exceeding a trust power or improperly exercising it, is fully protected in dealing with the trustee as if the trustee possessed and properly exercised the power the trustee purports to exercise. A third person is not bound to assure the proper application of trust property paid or delivered to the trustee.

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We disagree with Sakowski's contention that BONY does not qualify as "a third person dealing with a trustee" because the mortgage was executed between Debra and MERS, as nominee for Michigan Fidelity, or because the mortgage was executed by Debra in her individual capacity, not as trustee. BONY was not a party to the transaction between MERS and Debra, or to the transaction between Debra and the trust, but as an assignee of MERS it is a third party with rights in the transaction. Accordingly, the trial court correctly determined that BONY was entitled to the protection afforded by former MCL 700.7404.

\*3 Alternatively, BONY could be considered a bona fide purchaser for value. To qualify as a bona fide purchaser, BONY must have acted in good faith in taking its interest in the property, meaning that it had no reason to believe that there had been any fraud or other irregularity requiring further inquiry. *American Cedar & Lumber Co v. Gustin*, 236 Mich. 351; 210 NW 300 (1926); 1 Cameron, Michigan Real Property Law (3d ed.), § 11.21, p 396. A party claiming to be a bona fide purchaser cannot have "notice" of any such irregularity, which has been defined as "whatever is sufficient to direct the attention of a purchaser of realty to prior rights or equities of third persons and to enable the purchaser to ascertain their nature by inquiry." *Id.* at § 11. 22, p 396; *Kastle v. Clemons*, 330 Mich. 28, 46 NW2d 450 (1951). Here, there is no evidence that BONY had notice of any irregularities with Debra's earlier transactions with the trust or with MERS. Thus, it qualifies as a bona fide purchaser for value.

Accordingly, the trial court did not err in granting BONY's motion for summary disposition and quieting title in its favor. In light of our decision, it is unnecessary to address BONY's alternative equitable mortgage theory of relief.

Affirmed.

Mich.App.,2011.

Mortgage Electronic Registration Systems, Inc. v. Denise C. Parks Irrevocable Trust ex rel. Sakowski  
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(Mich.App.)

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