

ORIGINAL

IN THE SUPREME COURT OF OHIO

ABN AMRO MORTGAGE)	CASE NO.: 09-0553
)	
Plaintiff-Appellee)	On appeal from the Cuyahoga
)	County Court of Appeal, Eighth
Vs.)	Appellate District, Case No. CA 91401
)	
JACOB KANGAH, et al.,)	
)	
Defendants-Appellees)	
)	
CUYAHOGA COUNTY BOARD OF)	
COMMISSIONERS, DEPARTMENT)	
OF DEVELOPMENT)	
)	
Defendant-Appellant)	

MERIT BRIEF OF DEFENDANT-APPELLANT, CUYAHOGA COUNTY BOARD OF COMMISSIONERS, DEPARTMENT OF DEVELOPMENT

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STATEMENT OF THE CASE AND RELEVANT FACTS

The parties to this appeal are: Plaintiff-Appellee ABN AMRO Mortgage Group, Inc. (“ABN AMRO”) and Defendant-Appellant the Cuyahoga County Board of Commissioners Department of Development (“CCDOD.”) This appeal concerns a lien priority dispute in a foreclosure action against Defendant-Appellee Jacob Kangah, et al.

On July 5, 2000, Defendant-Appellee Jacob Kangah (“Kangah”) executed a promissory note and mortgage, of which CCDOD is the holder, in the original sum of \$7,500.00 with interest of 10% deferred until default. The promissory note was secured by a valid mortgage lien upon the real property located at 20617 Libby Road, Maple Heights, Ohio 44137, permanent parcel number 782-23-088, which mortgage was duly filed for record with the Cuyahoga County Recorder on July 12, 2000. A copy of the note and mortgage are attached to CCDOD’s Brief in Opposition to Plaintiff’s Motion for Summary Judgment filed December 28, 2007, Entry No. 69. The loan from CCDOD to Kangah was a down payment assistance loan. (Exhibit C attached to Entry No. 69) The mortgage is a subordinate security instrument. CCDOD acknowledges that it agreed that its mortgage was to be subordinate to the First Ohio Mortgage Corporation mortgage which was recorded the same date as the CCDOD mortgage. That same date, July 12, 2000, First Ohio Mortgage Corporation assigned its mortgage to Countrywide Home Loans, Inc. (Exhibit A to Plaintiff’s Motion for Summary Judgment on the Issue of Priority, Entry No. 75)

On June 12, 2001, Kangah executed a note in the amount of \$77,000.00 that was secured on the subject property by a mortgage in favor ABN AMRO. (Id.) According to the affidavit of Jimmie Edwards, attached to ABN AMRO’s motion for summary

judgment on the issue of lien priority, First Class Title Agency did the title work. (Entry No. ___) On June 19, 2001, ABN AMRO recorded its mortgage on the subject property with the Cuyahoga County Recorder. (Exhibit B to Entry No. 75) CCDOD does not dispute that ABN AMRO paid off the First Ohio Mortgage Corporation mortgage.

On November 8, 2006, ABN AMRO filed its complaint in foreclosure against Kangah, Ivory Kangah, the Navy Federal Credit Union and CCDOD.¹ (Entry No. 1) CCDOD filed its answer and cross-claim on December 4, 2006. (Entry No. 35)

On April 8, 2008, the trial court granted ABN AMRO's motion for summary judgment on the issue of priority "based on the doctrine of equitable subrogation." (Entry No. 75) The court further stated that "Equitable subrogation is essentially a theory of unjust enrichment and may defeat the statutory rule of first in time, first in right. In this case, Plaintiff paid the first mortgage lien and taxes when Defendant Jacob Kangah refinanced the subject property. Defendant Cuyahoga County Department of Development (CCDOD) held a subordinate mortgage and should not be enriched beyond the value of the original first mortgage."

CCDOD appealed to the trial court's decision to the Eighth District Court of Appeals. On January 29, 2009, the Court of Appeals released its opinion affirming the decision of the trial court. The opinion was journalized on February 9, 2009. The Court of Appeals stated that ABN AMRO was entitled to the doctrine of equitable subrogation because it intended to hold the first and best lien on the property, CCDOD agreed to its subordinate security interest, ABN AMRO's title company's failure to discover

¹ ABN AMRO had erroneously called CCDOD the "Ohio Department of Development." In actuality, CCDOD is the Cuyahoga County Board of Commissioners Department of Development.

CCDOD's mortgage lien was a mere mistake, and CCDOD was not prejudiced by its inferior position.

In its decision, the Court of Appeals described the conflict among appellate courts in the State of Ohio concerning the application of the doctrine of equitable subrogation:

“[S]ome courts have not applied the doctrine of equitable subrogation, even when the party intended to hold the first and best lien. For instance, two districts have not applied the doctrine of equitable subrogation when the party actually knew of the competing lien and failed to take adequate steps to protect its interest. See *Keybank Nat'l Assn. v. Adams*, Franklin App. No. 02AP-1293, 2003-Ohio-6651 (10th Dist.); *Fifth Third Bank v. Lorange*, App. No. CA2006-10-280, 2007-Ohio-4217 (12th Dist.).

Some Courts have not applied the doctrine of equitable subrogation when the party is negligent in its business practices (i.e. failing to record the mortgage lien in a timely fashion), and the party is in the best position to protect its interest. See *Old Republic Natl. Title Ins. Co. v. Fifth Third Bank*, Hamilton App. No. C-070567, 2008-Ohio-2059 (1st Dist.); *State Savings Bank v. Gunther* (1998), 127 Ohio App.3d 338 (3rd Dist.); *Huntington Natl. Bank v. Allgier*, Wood App. No. WD-07-061, 2008-Ohio-1289 (6th Dist.).

Also, two districts have declined to apply the doctrine of equitable subrogation when the title company failed to discover a preexisting and validly recorded mortgage, in essence, eliminating the doctrine altogether. See *Leppo, Inc. v. Kiefer* (Jan. 31, 2001), Summit App. Nos. 20097 and 20105, 2001 WL 81262; *Assoc. Fin. Serv. Corp. v. Miller* (Apr. 5, 2002), Portage App. No. 2001-P-0046, 2002 WL 519667.

Still, several courts allow equitable subrogation when the party mistakenly failed to discover a preexisting and validly recorded mortgage. See *Aultman*, 172 Ohio App.3d 584, 2007-Ohio-3706, 876 N.E.2d 617; *Fed. Natl. Mtge. Assn. v. Webb*, Morrow App. No. 2005CA0013, 2006-Ohio-3574, 2006 WL 1901016; *Cadle Co. No. 2 v. Rendezvous Realty* (Sept. 2, 1993), Cuyahoga App. Nos. 63565 and 63724, 1993 WL 335444; *Washington Mut. Bank v. Hopkins*, Franklin App. No. 07AP-320, 2007-Ohio-7008, 2007 WL 4532679. These courts have followed the Ohio Supreme Court's decision in *Jones*, which explained that equitable subrogation is applied to prevent fraud and relief from mistakes. [State] v. *Jones*, 61 Ohio St.2d 99, 15 O.O.3d 132, 399 N.E.2d 1215.

On February 5, 2009, CCDOD moved to certify a conflict. The Court of Appeals granted this motion on March 2, 2009 certifying the question:

Does the doctrine of equitable subrogation overcome the general rule set forth in R.C. 5301.23 when, prior to paying off a recorded mortgage or lien, a lender's sole negligence is its failure to discover a preexisting recorded subordinate mortgage or lien while conducting a title search and where the subordinate mortgage or lien holder-acts without fraud?

On March 12, 2009, ABN AMRO filed a motion for limited reconsideration of the judgment entry certifying the conflict. The Court of Appeals granted the motion on March 18, 2009 and re-phrased the certified conflict as follows:

Whether the doctrine of equitable subrogation applies when a prior lien is satisfied with loan proceeds and (1) the party asserting the doctrine intended to hold the first and best lien, and (2) the competing lienholder had the expectation that its interest would be junior at the time it received its interest, where the party asserting the doctrine has no actual knowledge of the competing lien due to its mistake or the mistake of the third party.

The Court of Appeals stated that the conflict cases are: *Wash. Mut. Bank v. Aultman*, which was certified as a conflict in 115 Ohio St.3d 1471, 2007-Ohio-5735, and *Alegis Group L.P. v. Lerner*, Delaware App. No. 2004-CAE-05038, 2004-Ohio-6205; *Leppo, Inc. v. Kiefer* (Jan. 31, 2001), Summit App. Nos. 20097 and 20105, and *Associates Financial Serv. Corp. v. Miller*, Portage App. No. 2001-P-46, 2002-Ohio-1610. *Wash. Mut. Bank* was later dismissed upon application of the appellant. 116 Ohio St.3d 1419, 2007-Ohio-6378.

This matter is now before this Honorable Court to resolve the conflict.

LAW AND ARGUMENT

PROPOSITION OF LAW NO. 1: EQUITABLE SUBROGATION DOES NOT APPLY TO GIVE A LENDER'S MORTGAGE PRIORITY OVER A VALIDLY RECORDED PRIOR MORTGAGE WHERE THE LENDER OR A THIRD PARTY TITLE EXAMINER PROVIDING THE TITLE WORK FOR THE LENDER NEGLIGENTLY FAILS TO DISCOVER THE PRIOR MORTGAGE

A. Summary Judgment Standard

To prevail on a motion for summary judgment, the moving party must demonstrate that, when the evidence is construed most strongly in favor of the non-moving party, no genuine issue of material fact remains to be litigated and that it is entitled to judgment as a matter of law. Civ.R. 56(C); *Harless v. Willis Day Warehousing Co.* (1978), 54 Ohio St.2d 64. A genuine issue of material fact exists unless it is clear that reasonable minds can come to but one conclusion and that conclusion is adverse to the non-moving party. *Williams v. First United Church of Christ* (1974), 37 Ohio St.2d 150, 151. An appellate court reviews a trial court's granting summary judgment de novo, applying the same standard used by the trial court. *Lorain Natl. Bank v. Saratoga Apts.* (1989), 61 Ohio App.3d 127.

B. General Rule is First in Time, First in Right

Generally, a party whose lien was first recorded is entitled to priority under R.C. 5301.23(A), which provides:

All properly executed mortgages shall be recorded in the office of the county recorder of the county in which the mortgaged premises are situated and shall take effect at the time they are delivered to the recorder for record. If two or more mortgages pertaining to the same premises are presented for record on the same day, they shall take effect in the order of their presentation. The first mortgage presented shall be the first recorded, and the first mortgage recorded shall have preference.

While this Court has recognized a narrow exception to the above “first in time, first in right” rule, to claim equitable subrogation, a party’s equity must be strong and his case clear. *State v. Jones* (1980), 61 Ohio St.2d 99, 102. The right to equitable subrogation depends upon the facts and circumstances of each particular case. Many courts have held that equitable subrogation cannot be used to benefit parties who are negligent in their business transactions, and who are in the best position to protect their own interests. See, e.g. *Assocs. Fin. Servs. Corp. v. Miller* (Apr. 5, 2002) Portage App. No. 2001-P-0046, 2002-Ohio-1610; *Wells Fargo Bank, N.A. v. Dupler* (July 6, 2007), Perry App. No. 06 CA 26, 2007-Ohio-3497; *Fifth Third Bank v. Lorange* (Aug. 20, 2007), Butler App. No. CA2006-10-280, 2007-Ohio-4217; *Leppo, Inc. v. Kiefer* (Jan. 31, 2001), Summit App. Nos. 20097 and 20105; *Wash. Mut. Bank v. Loveland* (Mar. 31, 2005), Franklin App. No. 04AP-920, 2005-Ohio-1542.

The Eighth District Court of Appeals has held otherwise. *The Cadle Company No. 2 v. Rendezvous Realty* (Sept. 2, 1993) Cuyahoga App. Nos. 63565, 63724. In the Cadle case, the Court stated that the negligence was immaterial. In the present case, it is true that CCDOD expected an inferior lien position to First Ohio Mortgage Corporation’s mortgage. However, CCDOD specifically agreed to be subordinate to that particular lien due to its terms, including the amount of the mortgage, which fit into CCDOD’s guidelines concerning debt-to-income ratio. CCDOD was not given an opportunity to approve or disapprove ABN AMRO’s mortgage and its terms. The effect of ABN AMRO and/or its title insurer’s negligence in not identifying CCDOD’s mortgage and not seeking a subordination agreement is not immaterial here.

C. Title insurer was negligent, but escapes its contractual obligation, and benefits from its own negligence if equitable subrogation is applied

The real party in interest here is the title insurer, who will benefit from application of the doctrine of equitable subrogation. It is the title insurer that is funding ABN AMRO's challenge to CCDOD's lien priority.

Assuming that the proceeds from the Sheriff's sale are sufficient to cover the court costs, property taxes and the amount owed to ABN AMRO, ABN AMRO will be made mostly whole no matter what the outcome of this case is. If the decision of the court of appeals is reversed and ABN AMRO is not allowed to benefit from the doctrine of equitable subrogation, the title insurer will pay ABN AMRO's losses. If the decision of the court of appeals is affirmed, the title company that conducted the title search prior to ABN AMRO approving the loan to Kangah will avoid paying a claim. But, if CCDOD is second in priority to ABN AMRO, it is likely that the proceeds of the Sheriff's sale will be insufficient to pay CCDOD's lien, and the CCDOD note prohibits a deficiency judgment against Kangah.

In the State of Indiana, courts have been reluctant to invoke the doctrine of equitable subrogation where to do so would benefit the negligent title insurer.

Subrogation *** is not an absolute right, but one which depends on the equities and attending facts and circumstances of each case. It would be a gross misapplication of the doctrine of subrogation were we to hold that its cloak settles automatically upon one who has simply made a mistake, when it is a commercial transaction involving a consideration...Further, it is difficult to think of a situation in which a title insurance company could not claim unjust enrichment as to someone who might inadvertently benefit by their negligence. Either they insure or they don't. It is not the province of the court to relieve a title insurance company of its contractual obligation.

First Federal Savings Bank of Wabash v. United States of America (C.A. 7, 1997), 118 F.3d 532, 534 quoting *Lawyers Title Ins. Corp. v. Capp* (1977), 174 Ind.App.633, 369 N.E.2d 672, 674. By imposing the doctrine of equitable subrogation in this case, the party that benefits is the title insurer that missed CCDOD's mortgage when it conducted the title search before ABN AMRO approved the loan to Kangah.

D. CCDOD will not receive a windfall if equitable subrogation is not applied

CCDOD uses in part federal funds to give qualifying low-income home owners down-payment assistance loans and rehabilitation loans. These loan programs are designed to assist county residents to achieve the American dream of becoming homeowners and to assist them in maintaining their homes. These programs benefit not only the individual who receives the loan, but the community as well. CCDOD does not profit from the repayment of loans. It uses repaid funds to assist other homeowners. CCDOD will not receive a windfall profit if the doctrine of equitable subrogation is not applied here. CCDOD will merely recoup its investment, and will then be able to use the funds to reinvest back into the community.

E. ABN AMRO and its title insurer had constructive notice of CCDOD's mortgage and should therefore not be equitably subrogated to CCDOD's position

Across the country, there are three different approaches in applying the doctrine of equitable subrogation. The first approach reasons that actual knowledge of an existing lien precludes application of the doctrine, but constructive notice does not. The second approach states that either *actual or constructive* knowledge of a prior lien bars application of the doctrine. The third approach focuses on whether the junior lienholder will be prejudiced by the doctrine. That is the position adopted by the Restatement (Third) of Property: Mortgages § 7.6 (1997.) *Ripley v. Piehl* (Minn. App. 2005), 700

N.W.2d 540, 544, 545. CCDOD argues that the second approach should be the one adopted by this Court.

CCDOD has no evidence that ABN AMRO or its title insurer had actual notice of CCDOD's mortgage. However, CCDOD's mortgage was validly and properly recorded with the Cuyahoga County recorder. Therefore, ABN AMRO and/or its title insurer had constructive notice of the mortgage. "Constructive notice' is a creature of statute and, as a matter of law, imputes notice to all *** of any properly recorded instrument even though the purchaser had no actual notice of the record." *Ripley v. Piehl* (Minn. App. 2005), 700 N.W.2d 540, 544.

In Kansas, an appellate court held that a mortgagee who, as a sophisticated institutional lender, made a mortgage loan with actual or constructive notice of an existing lien was not entitled to be equitably subrogated to the position of the prior mortgage. *Bankers Trust Company v. United States of America* (2001), 29 Kan.App.2d 215, 222, 25 P.3d 877, 882.² In that case, the bank argued that its 1997 mortgage lien should have priority over the United States' 1992 judgment lien. The bank had paid off existing encumbrances on the property that were senior to the government's lien. The trial court held that the doctrine of equitable subrogation should apply, placing the government's lien in an inferior position to that of the bank. On appeal, the court explained subrogation. Conventional subrogation arises from an agreement between the parties. Equitable subrogation, on the other hand, does not depend on an agreement and

² However, in this case, the court stated that the presence or absence of title insurance was not a factor in deciding whether the doctrine of equitable subrogation applies. *Id.* at 222, 882.

is a creature of equity. *Id.* (citations omitted.) The court cited a Kansas Supreme Court case.

[A] purchaser of *** real *** property is bound to take notice of facts affecting title to the property which the records of the county show, and which the records the statutes provide shall be public notice, then it is quite immaterial whether or not Kuhn had actual knowledge of the existence of the judgments. *** In the absence of *** fraudulent conduct the purchaser will be presumed to have bought with knowledge of all the facts which the records at the time would have disclosed. *Equity cannot be invoked to relieve one from the consequences of his own negligence.*

Id. at 219, 881 (Citations omitted.)

In Arkansas, a federal court held that equitable subrogation was inapplicable where the party seeking its application is chargeable with culpable and inexcusable neglect. *United States v. Hughes* (C.A. 8, 1974), 499 F.3d 322, 323. In that case, the lenders held a mortgage that was junior to a prior encumbrance of the Small Business Administration (“SBA”). The lenders paid off a lien that was superior to the SBA’s lien and argued that they should therefore be equitably subrogated to the first lien position. The court found that the lenders were guilty of inexcusable neglect by “failing to pay heed to the SBA second mortgage.” *Id.*

In Minnesota, a court held that a junior mortgagee could not recover under the doctrine of equitable subrogation because as a “sophisticated party,” the junior mortgagee should be held to a stricter standard and its negligent failure to discover the senior mortgagee’s prior interest was inexcusable under the higher standard. *Ripley v. Piehl* (Minn. App., 2005), 700 N.W.2d 540, 545, 547. The court noted that while equitable subrogation is a highly favored doctrine, it is not an absolute right. Rather, it depends on the equities and facts and circumstances of each case. *Id.* at 545. The equity of the party seeking subrogation must be “clear and substantial” and superior to that of all other

claimants. *Id.* “It is axiomatic that as an equitable doctrine, subrogation ‘aids the vigilant, and not the negligent.’” *Id.* (citation omitted.)

CCDOD acknowledges that many courts and states do allow application of the doctrine of equitable subrogation where a lender has no actual notice of the prior recorded mortgage.³ Some courts have even applied the doctrine where the party seeking equitable subrogation has actual notice of the prior recorded mortgage.⁴

Equitable subrogation undercuts the recording statutes. The Ohio recording statute is clear, and the legislature did not enact an exception to the statute. Any judicially created exceptions should be very narrow. Allowing equitable subrogation where a professional title company or mortgage company misses a properly recorded mortgage or lien would undercut the recording statute even more, in practicality judicially amending the recording statute. Amendment of the recording statute to allow exceptions is the province of the legislature.

In this case, CCDOD’s mortgage was properly recorded on July 12, 2000 in the Cuyahoga County Recorder’s Office. ABN AMRO’s mortgage was recorded on June 19, 2001, eleven months later. CCDOD’s mortgage is first in time and, under the statute, shall have preference. The county records gave ABN AMRO and its insurer constructive notice of CCDOD’s mortgage. The mortgage was there, for all to see. ABN AMRO and/or its title insurer must have been negligent because CCDOD’s mortgage was apparently not taken into account when ABN AMRO made the loan to Kangah. Even if

³ See, e.g. *Han v. United States* (C.A. 9, 1991), 944 F.2d 526; *Connecticut Nat’l Bank v. Chapman* (Conn.App. 1966), 216 A.2d 814; *Union Planters Bank N.A. v. FT Mortgage* (Ill. App. 2003), 794 N.E. 2d 360; *United Carolina Bank v. Beesley* (Maine App. 1995), 663 A.2d 574.

⁴ See, e.g. *Klotz v. Klotz* (Iowa App. 1989), 440 N.W.2d 406.

ABN AMRO argues that the CCDOD loan was deferred and not due until the property was transferred out of Kangah's name, it would be an unreasonable business practice to lend someone \$77,000.00 to be secured by a mortgage on real property and allow a prior recorded mortgage to remain "first in time" without at least addressing it or seeking a subordination agreement before the loan is made.

F. ABN AMRO's and/or its title insurer's negligence precludes application of the doctrine of equitable subrogation

In this case, ABN AMRO was in the best position to protect its own interest. It is standard business practice to have a title examination done on the subject property before lending money to be secured by a mortgage on the property. The undisputed fact that ABN AMRO and/or its title insurer did not take into account CCDOD's prior mortgage when it agreed to lend Jacob Kangah \$77,000.00 to be secured by a mortgage at the very least creates a material issue of fact concerning whether ABN AMRO and/or its title insurer was negligent, thereby prohibiting summary judgment. CCDOD further argues that the fact pattern demonstrates negligence on the part of ABN AMRO and/or its title insurer entitling CCDOD's mortgage to priority.

Also, it should be observed that CCDOD did nothing wrong or negligent here and acted reasonably and prudently in ensuring that its mortgage was duly recorded. See *State v. Jones* (1980), 61 Ohio St.2d 99. Due to ABN AMRO's and/or its title insurer's negligence, CCDOD was not given the opportunity to protect its interests, and the interests of taxpayers whose taxes are used to fund CCDOD's programs. ABN AMRO may have intended its mortgage to be first, but CCDOD intended its mortgage to be junior only to that of the original first mortgage, not ABN AMRO's subsequent mortgage. CCDOD was not given an opportunity to express its intent at the time ABN

recorded its mortgage, but clearly expressed its intent to be junior *only* to the First Ohio Mortgage Corporation mortgage and encumbrances of record on June 12, 2000. (See CCDOD mortgage and affidavit of Paul Herdeg, attached to Entry No. 51)

Equitable subrogation should not be available where a lender could have avoided the predicament about which it complains. See *Fifth Third Bank v. Lorance*. As stated above, when invoking the doctrine of equitable subrogation, a party's equity must be strong and the case clear. *Id*; *State v. Jones* (1980), 61 Ohio St.2d 99. In this case, ABN AMRO's equity is not strong and clear. ABN AMRO, as a sophisticated lender, and/or its title insurer had the ability to and should have seen CCDOD's mortgage before it approved its June 2001 loan to Jacob Kangah. If it had identified CCDOD's interest, ABN AMRO could have taken the mortgage into consideration and either paid off CCDOD's mortgage, denied the refinance or sought a subordination agreement with CCDOD.

G. Application of doctrine of equitable subrogation imposes an implied contract on a political subdivision and allows lenders to avoid seeking a subordination agreement with CCDOD

Evidence was submitted below that CCDOD is a political subdivision. (Exhibit C to CCDOD's Brief in Opposition to Plaintiff's Motion for Summary Judgment, Entry No. 69) CCDOD submitted evidence below that "It is ordinary and customary for the loan to be subordinate to only the intended senior lender in the transaction and its successors and assignees." (*Id.*) CCDOD does agree in certain cases to subordinate its mortgage when homeowners seek refinancing of the original first mortgage. The proposed new first mortgage must meet certain guidelines for CCDOD to agree to subordinate to a new first mortgage. The loan amount, interest rate, monthly payments and other terms of the

proposed new first mortgage are closely scrutinized to ensure that the terms of the new first mortgage do not put the homeowner at risk of foreclosure or jeopardize CCDOD's interest in the property. In this case, ABN AMRO and/or its title insurer negligently failed to identify CCDOD's mortgage prior to entering into a loan agreement with Jacob Kangah and therefore failed to either pay off the old first mortgage, or to seek a subordination agreement with CCDOD. Consequently, CCDOD had no opportunity to review the terms of the new first mortgage. Nevertheless, the trial court rewarded ABN AMRO's and/or its title insurer's negligence with priority over CCDOD's mortgage and imposed an implied contract on CCDOD.

Contracts with political subdivisions must be in writing because they involve taxpayer money. Political subdivisions are accountable to the public for contracts and for their use of taxpayer money. Here, the trial and appellate courts have essentially imposed a contract for subrogation and subordination upon CCDOD without requiring ABN AMRO to go through the available processes for securing a contract with CCDOD. Allowing equitable subrogation to stand in this case will encourage the avoidance of seeking a subordination agreement with CCDOD and other political subdivisions.

CONCLUSION

ABN AMRO's mortgage is not entitled to priority over CCDOD's mortgage because: 1) CCDOD's mortgage was filed first in time ahead of ABN AMRO's mortgage; 2) any judicially created exception to the recording statute should be applied very narrowly; 3) ABN AMRO has not shown that it is entitled to application of the doctrine of equitable subrogation due to its and/or its title insurer's negligence; and 4) application of the doctrine of equitable subrogation in this case will impose an implied

contract upon a political subdivision. For these reasons, the decisions of the trial court and Eighth District Court of Appeals should be reversed and CCDOD's mortgage lien should be ordered to have priority over ABN AMRO's mortgage.

Respectfully submitted,

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Attorney for Cuyahoga County, Ohio



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CERTIFICATE OF SERVICE

A true copy of the foregoing Brief of Defendant-Appellant Cuyahoga County Board of Commissioners, Department of Development was served this 23 day of July 2009, by regular U.S. Mail, postage prepaid upon:

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APPENDIX

IN THE SUPREME COURT OF OHIO

ABN AMRO MORTGAGE)
)
 Plaintiff-Appellee)
)
 Vs.)
)
 JACOB KANGAH, et al.,)
)
 Defendants-Appellees)
)
 CUYAHOGA COUNTY BOARD OF)
 COMMISSIONERS, DEPARTMENT)
 OF DEVELOPMENT)
)
 Defendant-Appellant)

CASE NO.: **09-0553**
On appeal from the Cuyahoga
County Court of Appeals, Eighth
Appellate District

NOTICE OF CERTIFIED CONFLICT

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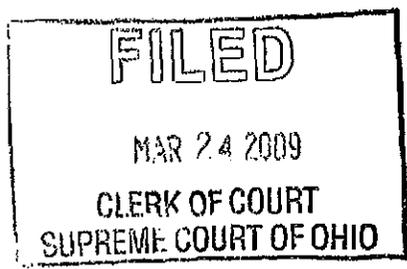
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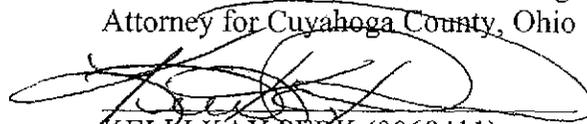
IN THE SUPREME COURT OF OHIO

ABN AMRO MORTGAGE)	CASE NO.:
)	
Plaintiff-Appellee)	On appeal from the Cuyahoga
)	County Court of Appeal, Eighth
Vs.)	Appellate District
)	
JACOB KANGAH, et al.,)	
)	<u>NOTICE OF CERTIFIED</u>
Defendants-Appellees)	<u>CONFLICT</u>
)	
CUYAHOGA COUNTY BOARD OF)	
COMMISSIONERS, DEPARTMENT)	
OF DEVELOPMENT)	
)	
Defendant-Appellant)	

Pursuant to S.Ct.Prac.R. IV, Sect. 1, the Cuyahoga County Board of Commissioners Department of Development, appellant herein, institutes an appeal in the above matter by filing herewith a Notice of Certified Conflict by the Eighth District Court of Appeals dated March 2, 2009 and March 18, 2009 as well as copies of the conflicting court of appeals opinions.

Respectfully submitted,

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Attorney for Cuyahoga County, Ohio



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PROOF OF SERVICE

A true copy of the foregoing Notice of Certified Conflict was served this 23 day of March 2009, by regular U.S. Mail, postage prepaid upon:

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Court of Appeals of Ohio, Eighth District

County of Cuyahoga
Gerald E. Fuerst, Clerk of Courts

ABN AMRO MORTGAGE GROUP, INC.

Appellee

COA NO.
91401

LOWER COURT NO.
CP CV-606632

COMMON PLEAS COURT

-vs-

JACOB KANGAH, ET AL.

Appellant

MOTION NO. 419583

Date 03/18/2009

Journal Entry

MOTION BY APPELLEE FOR LIMITED RECONSIDERATION OF THE COURT'S JUDGMENT ENTRY CERTIFYING CONFLICT IS GRANTED. MOTION NO. 418729 IS VACATED. THE NEW CERTIFIED QUESTION IS AS FOLLOWS:

"WHETHER THE DOCTRINE OF EQUITABLE SUBROGATION APPLIES WHEN A PRIOR LIEN IS SATISFIED WITH LOAN PROCEEDS AND (1) THE PARTY ASSERTING THE DOCTRINE INTENDED TO HOLD THE FIRST AND BEST LIEN, AND (2) THE COMPETING LIENHOLDER HAD THE EXPECTATION THAT ITS INTEREST WOULD BE JUNIOR AT THE TIME THAT IT RECEIVED ITS INTEREST, WHERE THE PARTY ASSERTING THE DOCTRINE HAS NO ACTUAL KNOWLEDGE OF THE COMPETING LIEN DUE TO ITS MISTAKE OR THE MISTAKE OF A THIRD PARTY."

THE OHIO SUPREME COURT RECENTLY CERTIFIED A CONFLICT OF A SIMILAR NATURE IN WASH. MUT. BANK V. AULTMAN, 115 OHIO ST.3D 1471, 2007-OHIO-5763, ALONG WITH ALEGIS GROUP L.P. V. LERNER, DELAWARE APP. NO. 2004-CAE-05038, 2004-OHIO-6205; LEPP0, INC. V. KIEFER (JAN. 31, 2001), SUMMIT APP. NOS. 20097 AND 20105; AND ASSOCIATES FINANCIAL SERV. CORP. V. MILLER, PORTAGE APP. NO. 2001-P-46, 2002-OHIO-1610. WE CERTIFY THAT THERE IS A RELATED CONFLICT IN THIS CASE.

RECEIVED FOR FILING

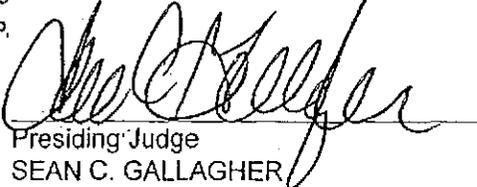
MAR 18 2009

GERALD E. FUERST
CLERK OF THE COURT OF APPEALS

Judge MARY J. BOYLE, Concur

DER.

Judge JAMES J. SWEENEY, Concur


Presiding Judge

SEAN C. GALLAGHER

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 91401

ABN AMRO MORTGAGE GROUP, INC.

PLAINTIFF-APPELLEE

vs.

JACOB KANGAH, ET AL.

DEFENDANTS-APPELLEES

**CUYAHOGA COUNTY BOARD OF COMMISSIONERS,
DEPARTMENT OF DEVELOPMENT**

DEFENDANT-APPELLANT

**JUDGMENT:
AFFIRMED**

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-606632

BEFORE: Gallagher, P.J., Boyle, J., and Sweeney, J.

RELEASED: January 29, 2009

CA08091401

55955725



JOURNALIZED: FEB - 9 2009

VRI 0675 00276

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FILED AND JOURNALIZED
PER APP. R. 22(E)

FEB 9 -- 2009

GERALD E. FUERST
CLERK OF THE COURT OF APPEALS
BY clg DEP.

ANNOUNCEMENT OF DECISION
PER APP. R. 22(B), 22(D) AND 26(A)

RECEIVED

JAN 29 2009

GERALD E. FUERST
CLERK OF THE COURT OF APPEALS
BY clg DEP.

CA08091401

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N.B. This entry is an announcement of the court's decision. See App.R. 22(B), 22(D) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(E) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(E). See, also, S.Ct. Prac.R. II, Section 2(A)(1).

NOTICE MAILED TO COUNSEL
FOR ALL PARTIES-COSTS TAXED

SEAN C. GALLAGHER, P.J.:

Defendant-appellant, Cuyahoga County Board of Commissioners, Department of Development (hereafter "CCDOD"), appeals the decision of the Cuyahoga County Court of Common Pleas, which determined that the mortgage held by plaintiff-appellee, ABN AMRO Mortgage Group, Inc. (hereafter "ABN"), had priority over CCDOD's mortgage. For the reasons that follow, we affirm.

On July 5, 2000, Jacob Kangah executed a promissory note with First Ohio Mortgage Corporation ("First Ohio") for \$68,916 that was secured by a mortgage on the property at 20617 Libby Road in Maple Heights, Ohio. In addition, Kangah executed a promissory note with CCDOD in the amount of \$7,500, which was also secured by a mortgage on the same property.

Both mortgages were recorded on July 12, 2000, with the CCDOD mortgage specifically referred to and recorded as the subordinate security instrument. That same day, the First Ohio mortgage was assigned to Countrywide Home Loans, Inc. ("Countrywide").

In May 2001, Kangah applied for a loan with ABN to refinance his property. In order to secure the loan, ABN required Kangah and his wife to execute a mortgage that would be the first and best lien on the property. ABN retained First Class Title Agency, Inc. ("First Class") to perform a title search and the closing. First Class identified the First Ohio mortgage but not the

CCDOD mortgage. A payoff statement was requested from Countrywide for the First Ohio mortgage.

On June 12, 2001, Kangah received loan proceeds totaling \$77,000 from ABN, which were secured by a mortgage on the property. The ABN mortgage was recorded on June 19, 2001. The loan proceeds were used to pay off the First Ohio mortgage, outstanding property taxes, and the fees and costs associated with the transaction.

On November 7, 2001, the First Ohio mortgage was released of record due to satisfaction of the mortgage.

On November 8, 2006, ABN filed a complaint for money judgment, foreclosure, and relief. On December 4, 2006, CCDOD filed its answer and cross-claim, alleging to have the first and best lien on the property.

In August 2007, ABN moved for summary judgment as to the priority of its mortgage interest. The matter was stayed because Kangah filed a Chapter 13 bankruptcy petition. When the case was reactivated, CCDOD filed a brief in opposition.

The magistrate granted summary judgment in favor of ABN on March 31, 2008, with decision to follow. In the meantime, on April 8, 2008, the trial court granted summary judgment in favor of ABN "based on the doctrine of equitable subrogation," finding that ABN had paid the first mortgage lien and taxes when

Kangah refinanced the property and that CCDOD held a subordinate mortgage. The court indicated “no just cause for delay.” On April 15, 2008, the magistrate filed her decision. CCDOD filed a motion to clarify (asking which was the final order), then objections to the magistrate’s decision, and finally a notice of appeal.

CCDOD advances one assignment of error for our review, which states the following:

“The trial court erred when it granted Appellee ABN AMRO Mortgage Group Inc.’s motion for partial summary judgment on the issue of lien priority.”

This court reviews a trial court’s grant of summary judgment de novo. *Ekstrom v. Cuyahoga Cty. Community College*, 150 Ohio App.3d 169, 2002-Ohio-6228. Before summary judgment may be granted, a court must determine that “(1) no genuine issue as to any material fact remains to be litigated, (2) the moving party is entitled to judgment as a matter of law, and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing the evidence most strongly in favor of the nonmoving party, that conclusion is adverse to the nonmoving party.” *State ex rel. Dussell v. Lakewood Police Dept.*, 99 Ohio St.3d 299, 300-301, 2003-Ohio-3652, citing *State ex rel. Duganitz v. Ohio Adult Parole Auth.*, 77 Ohio St.3d 190, 191, 1996-Ohio-326.

CCDOD argues that the doctrine of equitable subrogation does not apply

in this case because ABN failed to discover a validly recorded prior mortgage. CCDOD contends that the general rule “first in time, first in right” applies in this case.

ABN argues that the doctrine of equitable subrogation applies because ABN satisfied the First Ohio mortgage, which had priority over the CCDOD mortgage. In addition, it was ABN’s intent to hold the first and best lien on the property, while it was CCDOD’s intent to hold a subordinate lien.

R.C. 5301.23 sets forth the general rule that the first mortgage that is presented and recorded has preference over a subsequently presented and recorded mortgage. The priority of a mortgage is determined by reviewing the recording chronology. *Wash. Mut. Bank, FA v. Aultman*, 172 Ohio App.3d 584, 2007-Ohio-3706.

In some circumstances, the doctrine of equitable subrogation can overcome the general statutory rule. *Id.* at 589-590. Equitable subrogation “arises by operation of law when one having a liability or right or a fiduciary relation in the premises pays a debt by another under such circumstances that he is in equity entitled to the security or obligation held by the creditor whom he has paid.” *State v. Jones* (1980), 61 Ohio St.2d 99, 102, quoting *Federal Union Life Ins. Co. v. Deitsch* (1934), 127 Ohio St. 505, 510. In order to be entitled to equitable subrogation, “the equity must be strong and [the] case clear.” *Jones*, 61 Ohio

St.2d at 102.

In other words, a third party who, with its own funds, satisfies and discharges a prior first mortgage on real estate, upon express agreement with the owner that it will be secured by a mortgage on that real estate, is subrogated to all of the rights of the first mortgagee in that real estate. *Deitsch*, 127 Ohio St. at paragraph one of the syllabus. Therefore, if the parties intended, a mortgagee who satisfies the first mortgage steps into the shoes of the first mortgagee.

Nevertheless, some courts have not applied the doctrine of equitable subrogation, even when the party intended to hold the first and best lien. For instance, two districts have not applied the doctrine of equitable subrogation when the party actually knew of the competing lien and failed to take adequate steps to protect its interest. See *Keybank Natl. Assn. v. Adams*, Franklin App. No. 02AP-1293, 2003-Ohio-6651 (10th Dist.); *Fifth Third Bank v. Lorange*, App. No. CA2006-10-280, 2007-Ohio-4217 (12th Dist.).

Some courts have not applied the doctrine of equitable subrogation when the party is negligent in its business practices (i.e., failing to record the mortgage lien in a timely fashion), and the party is in the best position to protect its interest. See *Old Republic Natl. Title Ins. Co. v. Fifth Third Bank*, Hamilton App. No. C-070567, 2008-Ohio-2059 (1st Dist.); *State Savings Bank v. Gunther*

(1998), 127 Ohio App. 3d 338 (3rd Dist.); *Huntington Natl. Bank v. Allgier*, Wood App. No. WD-07-061, 2008-Ohio-1289 (6th Dist.).

Also, two districts have declined to apply the doctrine of equitable subrogation when the title company failed to discover a preexisting and validly recorded mortgage, in essence, eliminating the doctrine altogether. See *Leppo, Inc. v. Keiffer* (Jan. 31, 2001), Summit App. Nos. 20097, 20105 (9th Dist.); *Assoc. Financial Serv. Corp. v. Miller* (Apr. 5, 2002), Portage App. No. 2001-P-0046 (11th Dist.).

Still several courts allow equitable subrogation when the party mistakenly failed to discover a preexisting and validly recorded mortgage. See *Aultman*, supra (2nd Dist.); *Federal National Mortgage Assn. v. Webb*, Morrow App. No. 2005CA0013, 2006-Ohio-3574 (5th Dist.); *The Cadle Co. No. 2 v. Rendezvous Realty* (Sept. 2, 1993), Cuyahoga App. Nos. 63565, 63724; *Wash. Mutual Bank v. Hopkins*, Franklin App. No. 07AP-320, 2007-Ohio-7008 (10th Dist.). These courts have followed the Ohio Supreme Court's decision in *Jones*, which explained that equitable subrogation is applied to prevent fraud and relief from mistakes. *Jones*, 61 Ohio St.2d 99.

In the case at hand, we find that the doctrine of equitable subrogation applies because ABN intended to hold the first and best lien on the property, CCDOD agreed to its subordinate security interest, ABN's title company's failure

to discover CCDOD's mortgage lien was a mere mistake, and CCDOD was not prejudiced by its inferior position.

Next, CCDOD argues that the doctrine of equitable subrogation cannot be applied to a political subdivision. ABN argues that this issue was waived because CCDOD failed to raise the issue below. We disagree. Although, not ruled upon, CCDOD asserted this argument in the objections to the magistrate's decision.

CCDOD asserts that because equitable subrogation is essentially a theory of unjust enrichment, it does not apply. CCDOD cites to *Cooney v. City of Independence* (Nov. 23, 1994), Cuyahoga App. No. 66509, for its position. Specifically, CCDOD relies on this court's statement that "it has been said that a municipal corporation would not be liable upon quasi or implied contracts or for claims based upon theories of quantum meruit or unjust enrichment." *Id.*, citing *Cuyahoga Falls v. Ashcraft* (Dec. 26, 1991), Summit App. No. 15129.

This statement is taken out of context and does not stand for the proposition that equitable subrogation cannot apply to a political subdivision. In *Cooney*, supra, the plaintiff tried to enforce an oral employment contract against the city. The trial court dismissed the case for failure to state a claim. *Id.* This court affirmed the trial court's decision, citing *Ashcraft*, supra. *Cooney*, supra. In *Ashcraft*, supra, the court explained as follows: "[a]s a check against

misuse of city authority by local officials, procedural safeguards have been adopted which govern the creation of public obligations and liabilities. Generally, municipalities may not be bound to a contract unless the agreement is formally ratified through proper channels. *Wellston v. Morgan* (1901), 65 Ohio St. 219, paragraph three of the syllabus; *Seven Hills v. Cleveland* (1988), 47 Ohio App.3d 159, 161-163. As a result, a claim may not be sustained against a municipal corporation upon theories of implied or quasi-contract. *Montz Sales & Service, Inc. v. Barberton* (1983), 10 Ohio App.3d 157, 158; see 21 Ohio Jurisprudence 3d (1980) 371, Counties Townships, and Municipal Corporations; Section 809. Only express agreements adopted by the City in accordance with law may be enforced.” Cooney failed to state a claim because he did not have a written employment contract. *Cooney*, supra.

The *Cooney* case is wholly inapplicable to the case at hand. Although equitable subrogation has been called “a theory of unjust enrichment,” we agree with ABN that equitable subrogation is not limited to or by the concept of unjust enrichment. Unjust enrichment occurs when a person has and retains money or benefits which in justice and in equity belong to another. *Johnson v. Microsoft Corp.*, 106 Ohio St.3d 278, 2005-Ohio-4985. In the mortgage context, the doctrine of equitable subrogation is strictly confined to situations when “those who furnish or advance the purchase money to the purchaser in such a

manner that they can be said either to have paid it to the vendor personally, or caused it to be paid on behalf of and for the benefit of the purchaser, and to this extent they become parties to the transaction. It must not be a general loan to be used by the purchaser to pay the consideration of the purchase, or to be used for any other purpose at his pleasure." *Deitsch*, 127 Ohio St. at 510-511.

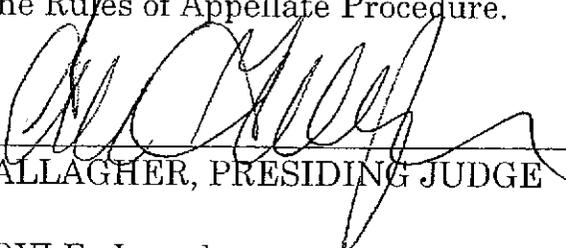
Here, ABN was not unjustly enriched. ABN paid off the first mortgage and expected to have first priority. CCDOD never expected to have first priority. This court has held that a title company's negligence is not material in cases in which the competing lienholder "was not misled or injured, because it did not bargain for or expect a first lien position." *Cadle Co.*, supra. Accordingly, CCDOD's first assignment of error is overruled.

It is ordered that appellees recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to
Rule 27 of the Rules of Appellate Procedure.



SEAN C. GALLAGHER, PRESIDING JUDGE

MARY J. BOYLE, J., and
JAMES J. SWEENEY, J., CONCUR

Westlaw

876 N.E.2d 617
 172 Ohio App.3d 584, 876 N.E.2d 617, 2007 -Ohio- 3706
 (Cite as: 172 Ohio App.3d 584, 876 N.E.2d 617)

Page 1

H

Court of Appeals of Ohio,
 Second District, Champaign County.
 WASHINGTON MUTUAL BANK, FA, Appellant,
 v.
 AULTMAN et al., Appellees.
 No. 2006 CA 25.

Decided July 20, 2007.

Background: Assignee of mortgage filed in rem foreclosure action against mortgagors, requesting, in part, that its mortgage be adjudged a valid first and best lien on property. Another mortgagee claimed her mortgage was the first and best lien on property. On cross-motions for summary judgment, the Court of Common Pleas, Champaign County, No. 2002-CV-315, denied assignee's motion for summary judgment and granted mortgagee's motion. Assignee appealed.

Holdings: The Court of Appeals, Wolff, P.J., held that:

(1) mortgage did not indicate that assignee's predecessor in interest agreed that it would subordinate mortgage to existing encumbrances, and
 (2) assignee was entitled to first-lien priority under the doctrine of equitable subrogation.

Judgment reversed and cause remanded.

West Headnotes

[1] Mortgages 266 ↪159

266 Mortgages
 266III Construction and Operation
 266III(D) Lien and Priority
 266k159 k. Priority as Affected by Provisions of Mortgage or by Agreement. Most Cited Cases
 Mortgage provision, stating that mortgagor warranted that there were no encumbrances, other than those of record, on the property, did not specify

what encumbrances existed and did not indicate that mortgagee agreed that it would subordinate the mortgage to any or all of those encumbrances.

[2] Mortgages 266 ↪163(1)

266 Mortgages
 266III Construction and Operation
 266III(D) Lien and Priority
 266k162 Priority of Record
 266k163 In General
 266k163(1) k. In General. Most

Cited Cases

Under the statutory scheme, the priority of a mortgage is determined simply by reviewing the recording chronology. R.C. § 5301.23(A).

[3] Subrogation 366 ↪17

366 Subrogation
 366k17 k. Junior Mortgagees or Lienors. Most Cited Cases

Subrogation 366 ↪31(4)

366 Subrogation
 366k31 Assignment or Benefit of Security or Incumbrance
 366k31(4) k. Assignment or Benefit of Mortgage, Judgment, or Lien. Most Cited Cases
 In some circumstances, the doctrine of equitable subrogation can overcome the general statutory rule that the first mortgage that is presented and recorded has preference over a subsequently presented and recorded mortgage. R.C. § 5301.23(A).

[4] Subrogation 366 ↪1

366 Subrogation
 366k1 k. Nature and Theory of Right. Most Cited Cases
 Equitable subrogation arises by operation of law when one having a liability or right or a fiduciary relation in the premises pays a debt by another under such circumstances that he is in equity entitled

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876 N.E.2d 617
172 Ohio App.3d 584, 876 N.E.2d 617, 2007 -Ohio- 3706
(Cite as: 172 Ohio App.3d 584, 876 N.E.2d 617)

to the security or obligation held by the creditor whom he has paid.

[5] Subrogation 366 ↪1

366 Subrogation

366k1 k. Nature and Theory of Right. Most Cited Cases

To be entitled to equitable subrogation, the equity must be strong and the case clear.

[6] Subrogation 366 ↪1

366 Subrogation

366k1 k. Nature and Theory of Right. Most Cited Cases

Subrogation 366 ↪27

366 Subrogation

366k27 k. Agreements for Subrogation. Most Cited Cases

Equitable subrogation is distinct from conventional subrogation, which is premised on the contractual obligations of the parties.

[7] Subrogation 366 ↪27

366 Subrogation

366k27 k. Agreements for Subrogation. Most Cited Cases

The focus of conventional subrogation is the agreement of the parties which must, in essence, allow the payor-creditor to be substituted for the creditor who is being discharged by the payor's loan.

[8] Subrogation 366 ↪38

366 Subrogation

366k37 Defenses and Grounds of Opposition

366k38 k. In General. Most Cited Cases

One of the purposes of employing equitable subrogation is to provide relief against mistakes; accordingly, the fact that a mistake occurred does not preclude the application of equitable subrogation in all circumstances.

[9] Subrogation 366 ↪31(4)

366 Subrogation

366k31 Assignment or Benefit of Security or Incumbrance

366k31(4) k. Assignment or Benefit of Mortgage, Judgment, or Lien. Most Cited Cases

Mortgage assignee was entitled to first-lien priority under the doctrine of equitable subrogation, where title agent inadvertently failed to discover preexisting mortgage, assignee's predecessor in interest did not fail to follow ordinary business practices to protect its interests, holder of preexisting mortgage was originally in the second-lien position, and assignee sought subrogation only to the extent that it paid off a prior mortgage and not to the full amount of its loan.

**618 David T. Brady, for appellant.

Darrell L. Heckman, Urbana, for appellee Diana Caldwell.

WOLFF, Presiding Judge.

*585 (§ 1) Washington Mutual Bank, FA, appeals from a judgment of the Champaign County Court of Common Pleas, which denied its motion for summary judgment**619 and granted the motion of Diana Caldwell for summary judgment, finding that Caldwell was entitled to first lien priority on property owned by *586 Steven and Kathy Aultman. For the following reasons, the judgment is reversed, and the cause is remanded for further proceedings.

(¶ 2) The facts underlying this appeal are undisputed.

(¶ 3) On November 26, 1994, Diana Caldwell sold the property located at 120-122 East Church Street in Urbana, Ohio, to Steven and Kathy Aultman.^{FNI} The Aultmans obtained a mortgage loan from Peoples Savings Bank in the amount of \$63,000. The loan from Peoples Savings Bank did not satisfy the full purchase price. Consequently, the Aultmans also granted a mortgage on the Church Street property to Caldwell in the amount of \$12,000. Caldwell's mortgage required a single

balloon payment of \$29,405.37 on November 1, 2003. A deed for the property and Peoples Savings Bank's mortgage were filed with the Champaign County Recorder's Office on November 28, 1994. On December 5, 1994, Caldwell filed her mortgage with the Recorder's Office. The parties agree that Peoples Savings Bank's mortgage was senior in priority to Caldwell's mortgage.

FN1. Although Caldwell's affidavit states that she sold the property on or about December 1, 1994, the certificate of preliminary judicial title report filed with the court on December 23, 2002, noted a survivorship deed from Caldwell to the **Aultmans** dated November 26, 1994, and filed on November 28, 1994. These are the same dates that the mortgage was executed and subsequently filed.

{¶ 4} On August 13, 1997, the **Aultmans** obtained a mortgage loan from American Equity Mortgage, Inc., in the amount of \$97,500. American Equity used \$62,234 of the loan proceeds to satisfy the Peoples Savings Bank mortgage. The **Aultmans** received the balance of the proceeds in cash. None of the proceeds were used to pay off the Caldwell mortgage. On the same day, American Equity assigned the mortgage to North American Mortgage Company, Washington Mutual's predecessor in interest. The mortgage and the assignment of mortgage were filed with the Recorder's Office on August 19, 1997.

{¶ 5} The **Aultmans** defaulted on Washington Mutual's mortgage. Consequently, on December 24, 2002, Washington Mutual filed an in rem foreclosure action against the **Aultmans**. Although the complaint acknowledged that Caldwell had recorded a mortgage on December 5, 1994, Washington Mutual requested, in part, that its mortgage be adjudged a valid first and best lien on the Church Street property. In her answer, Caldwell asserted that her mortgage was the first and best lien on the property.

{¶ 6} On April 6, 2004, the trial court entered a default judgment of foreclosure against the **Aultmans**, and it ordered a sheriff's sale of the property. The sheriff's sale was subsequently cancelled while Washington Mutual and Caldwell attempted to settle the issue of which mortgage had first-lien priority. When the parties failed to resolve the issue, the case was returned to the active docket. On *587 December 14, 2004, Washington Mutual filed a motion for summary judgment, requesting first-lien priority in the amount of \$62,234 plus interest due to equitable subrogation. After additional discovery, Caldwell also filed a summary judgment motion seeking to establish that her mortgage had priority over Washington Mutual's mortgage.

{¶ 7} On June 30, 2006, the trial court granted Caldwell's motion for summary judgment and overruled Washington Mutual's motion. The court noted that under **620 R.C. 5301.23(A), Caldwell's mortgage has priority over Washington Mutual's mortgage. Although the court recognized that equitable subrogation can defeat the priority scheme set forth in R.C. 5301.23, the court held that Washington Mutual was not entitled to equitable subrogation in this case. The court reasoned that Washington Mutual had failed to discover Caldwell's properly recorded mortgage, that there was no evidence that Washington Mutual was not in control of the loan process, and that there was no allegation that Caldwell had acted fraudulently or otherwise tried to conceal her mortgage from Washington Mutual. The court rejected Washington Mutual's assertion that granting Caldwell's mortgage first priority would constitute unjust enrichment, stating: "Instead, if equitable subrogation were applied in the instant matter, an innocent third party, Defendant Caldwell, would be harmed." The court further stated that Washington Mutual's mortgage provided that it was subject to "encumbrances of record." The court thus concluded that Washington Mutual's failure to discover a properly recorded mortgage rendered equitable subrogation inappropriate in this case.

{¶ 8} Washington Mutual raises two assignments on appeal, which we will address in reverse order.

{¶ 9} II. “The trial court erred in finding as fact that Washington Mutual’s predecessor in interest accepted the subject mortgage ‘subject to “encumbrances of record.” ’ ”

[1] {¶ 10} In its second assignment of error, Washington Mutual claims that the trial court erroneously found that the bank had accepted the mortgage subject to “encumbrances of record.”

{¶ 11} In ruling that Washington Mutual was not entitled to equitable subrogation, the trial court made the following finding:

{¶ 12} “34. The mortgage deed from Defendants **Aultman** to American Equity stated that the instant mortgage was issued subject to ‘encumbrances of record.’ Thus, it is clear that Plaintiff’s predecessor in interest accepted the mortgage subject to encumbrances of record, but that it failed to discover Defendant Caldwell’s properly recorded mortgage. See *Kiefer, supra*.”

*588 {¶ 13} Washington Mutual argues that the trial court misread the relevant mortgage provision, which stated: “Borrower is lawfully seised of the estate hereby conveyed and has the right to mortgage, grant and convey the Property and that the Property is unencumbered, except for encumbrances of record. Borrower warrants and will defend generally the title to the Property against all claims and demands, subject to any encumbrances of record.” Washington Mutual states that in this provision, the **Aultmans** granted the bank a covenant of seisin and a covenant against encumbrances. The bank asserts that this provision did not “serve to put all parties on notice that Washington Mutual takes subject to encumbrances of record.”

{¶ 14} Caldwell responds that Washington Mutual’s assignment is nothing more than “a semantic quibble of little significance.” She contends that the trial court’s finding “was undoubtedly made to fur-

ther distinguish this case from [*Federal Home Loan Mtge. Corp. v. Moore* (Sept. 27, 1990), Franklin App. No. 90AP-546, 1990 WL 140556] by showing that no one averred that there were no other mortgages of record. * * * The point is the mortgage was subject to other mortgages as a matter of law and no affidavit by the appellee, the sellers or anyone else stated the contrary.”

{¶ 15} In our view, the provision in the mortgage at issue merely stated that the **621 borrower warranted that there were no encumbrances, other than those of record, on the property. The provision did not specify what encumbrances existed. Moreover, it did not indicate that the mortgagee agreed that it would subordinate the mortgage to any or all of those encumbrances. To the contrary, other provisions in the mortgage required the **Aultmans** to discharge any lien that had priority over the American Equity mortgage. For example, Paragraph 4 of the mortgage provided:

{¶ 16} “Borrower shall promptly discharge any lien which has priority over this Security Instrument unless Borrower: (a) agrees in writing to the payment of the obligation secured by the lien in a manner acceptable to Lender; (b) contests in good faith the lien by, or defends against enforcement of the lien in, legal proceedings which in the Lender’s opinion operate to prevent the enforcement of the lien; or (c) secures from the holder of the lien an agreement satisfactory to Lender subordinating the lien to this Security Instrument. If Lender determines that any part of the Property is subject to a lien which may attain priority over this Security Instrument, Lender may give Borrower a notice identifying the lien. Borrower shall satisfy the lien or take one or more of the actions set forth above within 10 days of the giving of notice.”

{¶ 17} The 1-4 Family Rider further provided that “[e]xcept as permitted by federal law, Borrower shall not allow any lien inferior to the Security Instrument to be perfected against the Property without Lender’s prior written permission.”

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*589 {¶ 18} Based on the unambiguous terms of the mortgage, we agree with Washington Mutual that to the extent that the trial court found that Washington Mutual had agreed to take its mortgage subject to-and subordinate to-existing encumbrances, that finding is not supported by the mortgage document.

{¶ 19} The second assignment of error is sustained.

{¶ 20} I. "The trial court erred as a matter of law and committed reversible error when it denied the motion for summary judgment of Washington Mutual, FA, and granted the motion for summary judgment of Caldwell, finding that Washington Mutual Bank, FA, is not entitled to first lien position under the doctrine of equitable subrogation."

{¶ 21} Washington Mutual asserts that it was entitled to first-lien priority under the doctrine of equitable subrogation and that the trial court should have granted its motion for summary judgment. As an initial matter, we note that Washington Mutual has sought first priority for only \$62,234 of its \$97,500 loan, which represents the portion of the loan that was used to pay off the Peoples Savings Bank mortgage. The balance of the \$97,500 loan is not at issue.

{¶ 22} Our review of the trial court's decision to grant summary judgment is de novo. See *Helton v. Scioto Cty. Bd. of Commrs.* (1997), 123 Ohio App.3d 158, 162, 703 N.E.2d 841. Civ.R. 56(C) provides that summary judgment may be granted when the moving party demonstrates that (1) there is no genuine issue of material fact, (2) the moving party is entitled to judgment as a matter of law, and (3) viewing the evidence most strongly in favor of the nonmoving party, reasonable minds can come to but one conclusion, and that conclusion is adverse to the party against whom the motion for summary judgment is made. See *State ex rel. Grady v. State Emp. Relations Bd.* (1997), 78 Ohio St.3d 181, 183, 677 N.E.2d 343; **622*Harless v. Willis Day Warehousing Co.* (1978), 54 Ohio St.2d 64, 65-66, 8 O.O.3d 73, 375 N.E.2d 46.

[2] {¶ 23} R.C. 5301.23 sets forth the general rule that the first mortgage that is presented and recorded has preference over a subsequently presented and recorded mortgage. R.C. 5301.23(A). Accordingly, under the statutory scheme, the priority of a mortgage is determined simply by reviewing the recording chronology.

[3][4][5][6][7] {¶ 24} In some circumstances, the doctrine of equitable subrogation can overcome the general statutory rule. See, e.g., *IndyMac Bank, FSB v. Bridges*, 169 Ohio App.3d 389, 2006-Ohio-5742, 863 N.E.2d 185, ¶ 13. Equitable subrogation "arises by operation of law when one having a liability or right or a fiduciary relation in the premises pays a debt due by another under such circumstances that he is in equity entitled to the security or obligation held by the creditor *590 whom he has paid." ^{FN2} *State v. Jones* (1980), 61 Ohio St.2d 99, 102, 15 O.O.3d 132, 399 N.E.2d 1215, quoting *Fed. Union Life Ins. Co. v. Deutsch* (1934), 127 Ohio St. 505, 510, 189 N.E. 440. In order to be entitled to equitable subrogation, "[the] equity must be strong and [the] case clear." *Jones*, 61 Ohio St.2d at 102, 15 O.O.3d 132, 399 N.E.2d 1215.

FN2. Equitable subrogation is distinct from conventional subrogation, which is premised on the contractual obligations of the parties. "The focus of conventional subrogation is the agreement of the parties which must, in essence, allow the payor-creditor to be substituted for the creditor who is being discharged by the payor's loan." *Jones*, 61 Ohio St.2d at 101, 399 N.E.2d 1215.

{¶ 25} In *Jones*, the Supreme Court of Ohio considered whether a mortgagee was entitled to equitable subrogation when, after refinancing the mortgagor's loan, it unexpectedly found that it was subordinate to a prior recorded state tax lien. In that case, the property owners sought to refinance their mortgage with Cleveland Federal Savings & Loan Association. Cleveland Federal hired Midland Title to perform a title search of the property. The Au-

gust 1976 search revealed only the existing mortgage. After the title search but prior to executing the refinancing loan and mortgage, an Internal Revenue Service lien and two CPA certificates of judgment were filed for record. On September 21, 1976, the property owners and Cleveland Federal executed a second mortgage in the amount of \$44,000. The second mortgage was not recorded, however, until December 29, 1976. In the interim, the state of Ohio filed a certificate of judgment lien in the amount of \$70,000. In January 1977, Cleveland Federal satisfied the federal tax lien and the two CPA judgment liens, and it cancelled its own first mortgage. Cleveland Federal subsequently found that its mortgage was subordinate to the state's tax lien.

{¶ 26} On review, the Supreme Court rejected Cleveland Federal's assertion that it was entitled to equitable subrogation. The court reasoned that Cleveland Federal's "own actions led to its dilemma of not obtaining the best priority lien. [Cleveland Federal] was in complete control of the refinancing application, and, yet, by [its] own actions and inactions, the state, without acting fraudulently, was able to secure priority of its claims by its filing on October 19, 1976." *Id.* at 102-103, 15 O.O.3d 132, 399 N.E.2d 1215. The court noted that Cleveland Federal had expressly told the title company not to file the second mortgage until instructed to do so, which was more than three months after the execution of the document. Moreover, Cleveland Federal had cancelled its own mortgage without first receiving any title guarantec from the title company. The **623 court further noted that Cleveland Federal was aware of the "unusual debts to the accounting firm and also the Internal Revenue Service claim," but failed to inquire further as to any additional claims. The Supreme Court supported its decision by reference *591 to *Fl. Dodge Bldg. & Loan Assn. v. Scott* (1892), 86 Iowa 431, 53 N.W. 283, in which the Iowa Supreme Court denied equitable subrogation to a mortgagee that had relied upon an outdated abstract of title, contrary to ordinary business practice.

{¶ 27} Washington Mutual asserts that the present circumstances are distinguishable from *Jones* in that it did not act imprudently. Although Washington Mutual's title examiner missed the Caldwell mortgage in its title search, the bank had obtained an updated title search, the bank had intended to take first priority on the Church Street property, and it had promptly filed the mortgage for record six days after execution. Washington Mutual asserts that the title examiner's failure to note the Caldwell mortgage "should not be so material as to deny Washington Mutual recovery under the doctrine of equitable subrogation."

{¶ 28} In support of its assertion, Washington Mutual urges this court to follow *Moore*. In that case, the homeowners (the Moores) had a personal residential mortgage loan with Diamond Savings & Loan and second and third mortgages with Fifth Third Bank to secure a \$750,000 business loan. When the Moores refinanced their personal mortgage, the title company employed by Diamond mistakenly missed the mortgages to Fifth Third. Consequently, when Diamond released its first mortgage, Fifth Third's mortgages gained first priority. On appeal, the Tenth District reversed the trial court's denial of equitable subrogation. Distinguishing *Jones*, the appellate court reasoned that Diamond filed its mortgage only six business days after its execution and that Diamond's negligence was "only an ordinary mistake by Diamond's agent during its title search." The Tenth District further emphasized that the negligence was "immaterial" because Fifth Third was neither misled nor injured by the mistake. The court noted that Fifth Third had expected to be inferior in priority to Diamond's li- en.

{¶ 29} Washington Mutual further asserts that the trial court inappropriately relied upon cases from the Fifth, Ninth, and Eleventh Districts, as well as more recent cases from the Tenth District. See *Washington Mut. Bank v. Loveland*, Franklin App. No. 04AP-920, 2005-Ohio-1542, 2005 WL 737403; *Keybank Natl. Assn. v. GMAC Mtge. Corp.*, Frank-

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lin App. No. 02AP-1293, 2003-Ohio-6651, 2003 WL 22927344; *Chase Manhattan Bank v. Westin*, Clermont App. No. CA2002-12-099, 2003-Ohio-5112, 2003 WL 22227394; *FirstMerit Bank, N.A. v. Andrews*, Portage App. No. 2003-P-121, 2004-Ohio-5104, 2004 WL 2803228. Washington Mutual argues that the factual circumstances in each of these cases is distinguishable, because the party seeking equitable subrogation was negligent beyond mere mistake.

{¶ 30} Finally, Washington Mutual argues that Caldwell would not be prejudiced by the subrogation because she would be in the same position that existed prior to the *Aultmans'* refinancing of the Church Street property. Moreover, the *592 bank claims that Caldwell would be unjustly enriched by the first lien priority because she did not bargain for first lien position and gave no consideration for that priority.

{¶ 31} In response, Caldwell argues that this matter is governed by *Jones* and that Washington Mutual's negligence precludes the application of equitable subrogation. **624 Although Caldwell asserts that *Jones* resolves the issue, she notes that the Eleventh District in *Assocs. Fin. Servs. v. Miller* (Apr. 5, 2002), Portage App. No. 2001-P-46, 2002 WL 519667, affirmed the denial of Pan American Bank's request for equitable subrogation when the bank's agent conducted a title search but failed to discover a preexisting mortgage. The *Miller* court reasoned that Pan American "was in complete control of the loan process, and there is no allegation that appellee acted fraudulently or otherwise tried to conceal its properly recorded mortgage from appellant." The court rejected Pan American's contention that the appellee was unjustly enriched simply because the bank's negligence provided it with a benefit. The court concluded: "Equitable subrogation will not be used to benefit parties who were negligent in their business transactions, and who were obviously in the best position to protect their own interests."

{¶ 32} Caldwell asserts that *Moore* was decided

wrongly and that the Tenth District failed to rationally distinguish *Jones*. Caldwell also states that *Moore* involved refinancing by the same lender while the present case involves a different lender and a different amount.

{¶ 33} Caldwell further argues that negligence in failing to conduct a property title search is not a valid basis for employing equitable subrogation. She contends that applying equitable subrogation in such circumstances would encourage carelessness and obviate the need for title searches and title insurance.

{¶ 34} In our view, Caldwell reads *Jones* too restrictively. *Jones* does not prohibit the application of equitable subrogation in all circumstances in which the mortgagee has been negligent. Rather, *Jones* and *Scott*, which *Jones* followed, denied the application of equitable subrogation because the party seeking equitable subrogation had failed to act in conformity with ordinary and reasonable practices to establish its first priority. See, also, *State Sav. Bank v. Gunther* (1998), 127 Ohio App.3d 338, 713 N.E.2d 7 (denying equitable subrogation when bank filed the promissory note and mortgage nine months after closing on the transaction).

{¶ 35} The same was true in *Loveland, Keybank*, and *Westin*. In *Loveland*, the Tenth District Court of Appeals denied Washington Mutual's request for equitable subrogation when the bank failed to ensure that Fifth Third Bank, with which the mortgagors had a revolving line of credit, closed the home equity line. The court stated: "[A]ppellant failed to follow the proper procedures to have the *593 account closed and also failed to confirm that the equity line had been closed and properly released to ensure that it had first priority in the public records." *Id.* at ¶ 13. *Loveland* cited with approval *Keybank*, in which the Tenth District did not apply equitable subrogation when the bank seeking subrogation knew of the second mortgage but failed to get a subrogation agreement, which the bank knew was required.

{¶ 36} In *Westin*, the Westins took out two small business loans, which were secured by two mortgage liens on their property. The Westins subsequently obtained two residential mortgage loans (loans 3 and 4), and they agreed to subordinate the two small business loans to loan 3. In 1998, the Westins obtained an additional mortgage on the property, which was used to pay off the two residential mortgage loans. After the Westins defaulted, Chase Manhattan Bank, the assignee of the fifth mortgage loan, brought a foreclosure action and sought first-lien priority. The Twelfth District Court of Appeals affirmed the denial of equitable subrogation. It stated: "Chase relied upon the 'incorrect and uninformed assumption' that North **625 Side [the mortgagee for the small business loans] would subrogate its mortgage liens to Chase's new mortgage lien. Chase never verified with North Side that Chase would retain priority after paying off Loans 3 and 4. Chase was in complete control of the loan process and therefore could have protected its own interests. The mistake solely rests with Chase."

{¶ 37} Because the parties seeking equitable subrogation in *Jones*, *Loveland*, *Keybank*, and *Westin* failed to follow reasonable practices to protect their interests, we find those cases readily distinguishable from the present case.

{¶ 38} As noted by Caldwell, the Eleventh District Court of Appeals in *Miller* refused to apply equitable estoppel when the bank's agent failed to discover a preexisting mortgage lien during a title search. The Ninth District has also adopted this view. *Leppo, Inc. v. Kiefer* (Jan. 31, 2001), Summit App. Nos. 20097 and 20105, 2001 WL 81262. *Miller* and *Kiefer* are thus at odds with *Moore*, which permitted equitable subrogation under these circumstances. See, also, *First Union Natl. Bank v. Harmon*, Franklin App. No. 02AP-77, 2002-Ohio-4446, 2002 WL 1980705 (allowing equitable subrogation when title agent missed existing second mortgage during review of title abstract prior to refinancing).

[8] {¶ 39} In our view, *Moore* presents the better approach to the circumstances before us. As stated in *Jones*, one of the purposes of employing equitable subrogation is to provide relief against mistakes. *Jones*, 61 Ohio St.2d at 102, 15 O.O.3d 132, 399 N.E.2d 1215, quoting *Canton Morris Plan Bank v. Most* (1932), 44 Ohio App. 180, 184, 184 N.E. 765. See, also, *Bridges* at ¶ 13; *Westin* at ¶ 8-9. Accordingly, the fact that a mistake occurred does not preclude the application of equitable subrogation in *all* circumstances.

*594 [9] {¶ 40} Herein, it is undisputed that Washington Mutual's predecessor provided a loan in the amount of \$97,500 to the **Aultmans**. Washington Mutual satisfied the prior mortgage of Peoples Savings Bank in the amount of \$62,234 with the proceeds of its loan for the express purpose of obtaining the first mortgage on the property. The mortgage was filed on August 19, 1997, six days after closing on the loan. Caldwell acknowledges that Washington Mutual's lack of awareness of her mortgage was due to a defective title search. The title report was attached as an exhibit to Caldwell's memorandum in opposition to Washington Mutual's motion for summary judgment. There are no allegations that the bank failed to obtain a title search at the appropriate time or was dilatory in filing the mortgage.

{¶ 41} Based on the record, Washington Mutual's failure to achieve first-lien position was due solely to the title agent's inadvertent failure to discover Caldwell's preexisting mortgage. Washington Mutual's negligence was a "mere mistake," and its failure to obtain first-lien position was not due to the bank's failure to follow ordinary business practices to protect its interests. The application of equitable subrogation in this instance comports with the doctrine's purpose of providing relief from mistakes.

{¶ 42} Moreover, Caldwell's position would not change as a result of subrogation. Caldwell was originally in the second-lien position, and Washington Mutual has sought subrogation only to the extent that it paid off the Peoples Savings Bank mortgage

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and not to the full amount of its loan. Accordingly, the substitution of Washington Mutual for Peoples Savings Bank, in the amount of \$62,234, has no effect on Caldwell's original position. Although Caldwell's mortgage was executed **626 shortly after the sale of the property and was filed days after Washington Mutual's mortgage, Caldwell's mortgage did not require the **Aultmans** to provide first-lien priority. Under these facts, Washington Mutual's equity is strong, and the case is clear. Based on the record before us, the trial court should have applied the doctrine of equitable subrogation, granted Washington Mutual's motion for summary judgment, and overruled Caldwell's motion for summary judgment.

{¶ 43} The first assignment of error is sustained.

{¶ 44} The judgment of the trial court is reversed, and the cause is remanded for further proceedings consistent with this opinion.

Judgment reversed and cause remanded.

GRADY and DONOVAN, JJ., concur.
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C
CHECK OHIO SUPREME COURT RULES FOR REPORTING OF OPINIONS AND WEIGHT OF LEGAL AUTHORITY.

Court of Appeals of Ohio, Fifth District, Delaware County.

ALEGIS GROUP L.P. Plaintiff-Appellee

v.

Steven D. **LERNER**, et al Defendants-Appellants
No. 2004-CAE-05038.

Nov. 15, 2004.

Background: Holder of second mortgage filed complaint in foreclosure. The Court of Common Pleas, Delaware County, No. 03-02-109, entered summary judgment in favor of bank, establishing priority of mortgages and judgment lien. Judgment creditor appealed.

Holding: The Court of Appeals, Gwin, J., held that bank could not set forth a prima facie case for equitable subrogation of its mortgage and, as a result, statutory scheme would determine priority of properly recorded second mortgage and judgment lien.

Reversed and remanded.

Mortgages 266  **163(2)**

266 Mortgages

266III Construction and Operation

266III(D) Lien and Priority

266k162 Priority of Record

266k163 In General

266k163(2) k. Priorities Between Mortgages or Deeds of Trust. Most Cited Cases

Mortgages 266  **178**

266 Mortgages

266III Construction and Operation

266III(D) Lien and Priority

266k177 Circumstances and Transactions Subsequent to Mortgage Affecting Priority

266k178 k. In General. Most Cited Bank could not set forth a prima facie case for equitable subrogation of its mortgage and, as a result, statutory scheme would determine priority of properly recorded second mortgage and judgment lien, where bank's title company mistakenly reported second mortgage was released and did not discover judgment lien, and there was no evidence that any party misled bank or its agent, or interfered in its title search. R.C. 5301.23.

Civil appeal from the Delaware County Court of Common Pleas, Case No. 03-02-109, Reversed and Remanded. Amelia A. Bower, Columbus, OH, for Plaintiff-Appellee.

J. Edward Foley, Westerville, OH, for Defendant-Appellant.

Hon: W. SCOTT GWIN, P.J., Hon: WILLIAM B. HOFFMAN, J. and Hon: JOHN F. BOGGINS, J.

OPINION

GWIN, J.

*1 {¶ 1} Appellant Southprint, Inc. appeals a summary judgment of the Court of Common Pleas of Delaware County, Ohio, which granted a decree of foreclosure against the property owned by appellees Steven D. and April J. Lerner, and established the priority of mortgages and liens against the property. Appellant assigns a single error to the trial court:

{¶ 2} "I. THE TRIAL COURT ERRED, ABUSED ITS DISCRETION AND COMMITTED REVERSIBLE ERROR WHEN IT APPLIED THE DOCTRINE OF EQUITABLE SUBROGATION AND GRANTED PARTIAL SUMMARY JUDGMENT

TO THE DEFENDANT, U.S. BANK, AND DENIED THE MOTION OF DEFENDANT, SOUTHPRINT, INC. FOR RECONSIDERATION ON THE ISSUE OF LIEN PRIORITY.”

{¶ 3} The record indicates on December 21, 1995, appellees Steven and April **Lerner** executed a mortgage in favor of First Deposit National Bank in the amount of \$119,200. On the same day, the **Lerners** executed a second mortgage to First Deposit for \$10,000. The mortgages were filed in Delaware County, Ohio. In March, 2001, First Deposit assigned the second mortgage to plaintiff-appellee **Alegis** Group, and the assignment was filed in the Delaware County Recorder's Office as well.

{¶ 4} On July 8, 1998, defendant-appellant Southprint recorded a judgment against Steven **Lerner** in the amount \$8,885.45 plus interest.

{¶ 5} In January of 2002, the **Lerners** refinanced their loan through New Century Mortgage Corporation for \$134,000. New Century ordered a title search, which incorrectly reported the second mortgage was released, and which did not disclose any judgment liens against the property. New Century paid the prior mortgage and advanced the **Lerners** \$11,339.13. The new mortgage was filed in Delaware County. New Century did not satisfy either the second mortgage or the judgment lien, but only the first mortgage. New Century later became U.S. Bank.

{¶ 6} **Lerner's** defaulted on their payments on the second mortgage, and **Alegis** filed its complaint in foreclosure in February 2003. The court granted default judgment, and then entertained motions for summary judgment on the issue of the priority of the various encumbrances on the property. The trial court's summary judgment of January 22, 2004 found U.S. Bank in first position after taxes and costs, to the extent of the prior mortgage it paid off, with interest; **Alegis** Group in second position; Southprint, Inc. in third position; and U.S. Bank for the balance owed on its mortgage.

{¶ 7} Southprint and **Alegis** filed motions for reconsideration, which were overruled on April 22, 2004. Also on April 22, 2004, the court entered a decree of foreclosure, and this appeal ensued.

{¶ 8} The trial court found the doctrine of equitable subrogation required U.S. Bank be granted priority in its lien to the extent it had discharged the original first lien, but not as to the additional funds given to the **Lerner's**. The court distinguished our case of *The Bank of New York v. Fifth Third Bank* (January 30, 2002), Delaware Appellate No. 01CAE03005, 2002-Ohio-352, and found the facts in *Federal Home Loan Mortgage Corporation v. Moore* (September 27, 1990), Franklin Appellate No. 90AP-546, more similar to the case at bar.

*2 {¶ 9} R.C. 5301.23 sets forth the general rule regarding priority of mortgages. It provides all mortgages shall be recorded in the office of the county recorder in the county in which the mortgaged premises are situated, and shall take effect at the time they are delivered to the recorder. If two or more mortgages against the same property are presented for recording on the same day, they take effect in order of their presentation, with the mortgage first in time having priority.

{¶ 10} The doctrine of subrogation is sometimes applied by courts to alter the statutory scheme. Subrogation generally substitutes one party in the place of another with reference to the other's claim or right, see, e.g., *Federal Union Life Insurance v. Deitsch* (1934), 127 Ohio St. 505, 189 N.E. 440. In *State Department of Taxation v. Jones* (1980), 61 Ohio St.2d, 99, 399 N.E.2d 1215, the Ohio Supreme Court explained conventional subrogation focuses on the contractual obligations of the parties, either express or implied, which compel a payor-creditor to be substituted for the creditor discharged by the payor-creditor's loan. Legal subrogation, on the other hand, arises by operation of law when one party pays a debt due by another under such circumstances that he is in equity entitled to the security or obligation held by the creditor whom he has paid. Traditionally, subrogation grants relief to a

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Not Reported in N.E.2d, 2004 WL 2647607 (Ohio App. 5 Dist.), 2004 -Ohio- 6205

(Cite as: 2004 WL 2647607 (Ohio App. 5 Dist.))

party in order to prevent fraud, or to grant relief from mistake, and subrogation depends upon the facts and circumstances of each particular case, *Jones*, citing *Canton Morris Plan Bank v. Most* (1932), 44 Ohio App. 108, 184 N.E. 765.

{¶ 11} In the *Moore* case, relied upon by the trial court, the Moore's refinanced several existing mortgages on their home. The property carried a personal first mortgage and a partnership mortgage on the residence. Later, there was a third mortgage to secure a business loan. At this point, all the lenders were aware of the first mortgage. However, when Moore's refinanced their loans, they failed to disclose the third, business loan, and the title searchers missed the lien. On these facts, the Court of Appeals for the 10th District found the bank's negligence was not material as to equitable subrogation, because the bank properly filed its mortgage. The only mistake was in the title search, and no one was misled or injured by this mistake. The court found no one changed their position in reliance on the mistake, and there was no prejudice because the holder of the third mortgage never bargained for or expected to be first in priority. The Franklin County Court of Appeals found to elevate the third mortgage to a first lien position would be inequitable because it would give the bank what it referred to as "unearned windfall". Finally, the Franklin County Court of Appeals found the title company's negligence did not change appellant's rights to equitable subrogation even if the appellant had a remedy against the title company.

*3 {¶ 12} In our case of *Bank of New York v. Fifth Third Bank*, the facts were quite different. There, the Laymon family had an open-end mortgage also known as a home equity line of credit or revolving credit line from Fifth Third Bank. When Laymon's decided to consolidate their loan through the Bank of New York, the Bank of New York requested a payoff statement from Fifth Third Bank. The Bank of New York sent the payoff check as requested, but Laymon's did not submit a written request to Fifth Third Bank to cancel the equity line of credit.

At some point later, the Laymon's discovered they still had their equity loan, and borrowed the maximum amount on the credit line. When the Laymon's defaulted, the trial court had to determine the priorities of the liens. The court held Fifth Third's lien was entitled to priority pursuant to statute, and the mortgage of the Bank of New York was inferior to Fifth Third Bank's lien. We agreed, finding pursuant to R.C. 5301.232, the open-ended mortgage was effective at the time it was recorded regardless of when the lender actually made the advances secured by the mortgage. This court declined to provide equitable relief to the Bank of New York, finding it had not protected its own interest by insuring the first loan was cancelled, and there was no evidence Fifth Third Bank had in any way contributed to the mistake. This court held a prima facie case for equitable estoppel requires a plaintiff to prove: (1) that the defendant made a factual misrepresentation; (2) that is misleading; (3) which induces actual reliance which is reasonable and in good faith; and (4) which results in a detriment to the relying party, *Bank of New York*, supra, citing *Doe v. Blue Cross/Blue Shield of Ohio* (1992), 79 Ohio App.3d 369, 607 N.E.2d 492.

{¶ 13} Turning to the case at bar, we must review the actions of the parties. U.S. Bank's title company clearly made mistakes when it reported appellee's second mortgage was released, when in fact it was not. The company was also negligent in not discovering appellant Southprint's lien. There is nothing in the record to indicate any of the other parties misled U.S. Bank or its agent, or interfered in its search.

{¶ 14} We find U.S. Bank could not set forth a prima facie case for equitable subrogation, and upon these facts, where the record only shows that properly recorded mortgages and liens were not found, there is no reason to depart from the statutory scheme set forth in R.C. 5301 regarding the priority of liens.

{¶ 15} U.S. Bank urges appellant did not file a brief in opposition to U.S. Bank's motion for sum-

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Not Reported in N.E.2d, 2004 WL 2647607 (Ohio App. 5 Dist.), 2004 -Ohio- 6205
(Cite as: 2004 WL 2647607 (Ohio App. 5 Dist.))

mary judgment, but only filed a motion for reconsideration after the court entered its judgment. A review of the docket and record does not substantiate this assertion.

{¶ 16} The assignment of error is sustained.

{¶ 17} For the foregoing reasons, the judgment of the Court of Common Pleas of Delaware County, Ohio, is reversed, and the cause is remanded to that court for further proceedings in accord with law and consistent with this opinion.

HÖFFMAN, J., and BOGGINS, J., concur.

JUDGMENT ENTRY

*4 For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Court of Common Pleas of Delaware County, Ohio, is reversed, and the cause is remanded to that court for further proceedings in accord with law and consistent with this opinion. Costs to appellee U.S. Bank.

Ohio App. 5 Dist.,2004.
Alegis Group L.P. v. Lerner
Not Reported in N.E.2d, 2004 WL 2647607 (Ohio App. 5 Dist.), 2004 -Ohio- 6205

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CHECK OHIO SUPREME COURT RULES FOR REPORTING OF OPINIONS AND WEIGHT OF LEGAL AUTHORITY.

Court of Appeals of Ohio, Eleventh District, Portage County.

ASSOCIATES FINANCIAL SERVICES CORPORATION, Plaintiff-Appellee,

v.

Mike MILLER, et al., Defendants,

PAN AMERICAN BANK, FSB, Defendant-Appellant.

No. 2001-P-0046.

April 5, 2002.

Holder of first mortgage on property filed complaint in foreclosure against the property, and named, among others, the holder of second mortgage, and the owner, as defendants. The Court of Common Pleas entered summary judgment for the first mortgage holder, and against the owner and second mortgage holder. Owner and second mortgage holder appealed. The Court of Appeals, Portage County, Christley, J., held that doctrine of equitable subrogation did not apply to give second mortgage priority over first mortgage even though the holder of the first mortgage willingly accepted an inferior lien position when the prior owner gave the company a mortgage on the property.

Affirmed.

West Headnotes

[1] Subrogation 366 ↪1

366 Subrogation

366k1 k. Nature and Theory of Right. Most Cited Cases

Generally speaking, "subrogation" is the substitution of one person in the place of another with ref-

erence to a lawful claim or right.

[2] Subrogation 366 ↪1

366 Subrogation

366k1 k. Nature and Theory of Right. Most Cited Cases

Unlike conventional subrogation, which is premised on the contractual obligations of the parties, "equitable subrogation" arises by operation of law when one having a liability or right or a fiduciary relation in the premises pays a debt due by another under such circumstances that he is in equity entitled to the security or obligation held by the creditor whom he has paid.

[3] Subrogation 366 ↪23(3)

366 Subrogation

366k23 Persons Making Advances for Discharge of Debt or Incumbrance

366k23(3) k. Advances or Loans on Faith of or Agreement for New Security. Most Cited Cases

Subrogation 366 ↪38

366 Subrogation

366k37 Defenses and Grounds of Opposition

366k38 k. In General. Most Cited Cases

Doctrine of equitable subrogation did not apply so as to give second mortgagee priority over holder of first mortgage filed prior to recordation of second mortgage, where second mortgagee's agent conducted the title search but failed to discover holder's preexisting mortgage, second mortgagee was in complete control of the loan process, and there was no allegation that holder of first mortgage acted fraudulently or otherwise tried to conceal its properly recorded mortgage from the second mortgagee even though the holder willingly accepted an inferior lien position when the purchaser gave the company a mortgage on the property.

[4] Subrogation 366 ↪38

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(Cite as: 2002 WL 519667 (Ohio App. 11 Dist.))

366 Subrogation

366k37 Defenses and Grounds of Opposition

366k38 k. In General. Most Cited Cases

Equitable subrogation will not be used to benefit parties who were negligent in their business transactions, and who were obviously in the best position to protect their own interests.

Civil Appeal from the Court of Common Pleas, Case No. 99 CV 0932, Judgment Affirmed. Atty. Rick D. DeBlasis, Lerner, Sampson & Rothfuss, Cincinnati, OH, for plaintiff-appellee.

Atty. Robert B. Holman, Oakwood Village, OH, for defendant-appellant.

WILLIAM M. O'NEILL, P.J., JUDITH A. CHRISTLEY and ROBERT A. NADER, JJ.

OPINION

CHRISTLEY, J.

*1 This is an accelerated calendar appeal submitted to the court on the briefs of the parties. Appellant, Pan American Bank, FSB, appeals from a final judgment of the Portage County Court of Common Pleas granting appellee, Associates Financial Services Corporation, summary judgment. For the following reasons, we affirm the judgment of the trial court.

On September 13, 1993, Thomas Summer ("Summer") conveyed property located at 3429 Pioneer Trail, Mantua, Ohio, to Michael and Cynthia Miller ("the Millers"). The Millers subsequently granted a mortgage on the property to appellee in the amount of \$123,326.80 on May 14, 1996.

On September 12, 1997, Summer filed a complaint to regain title, claiming that the Millers had fraudulently acquired the property from him. The case was resolved when a consent judgment entry was filed on March 13, 1998, in which the Millers were ordered to transfer title back to Summer.

After regaining title, Summer obtained a loan from appellant, which was secured by a mortgage on the property. The record shows that a portion of the loan proceeds was used to extinguish two other mortgages given by Summer to Huntington National Bank ("Huntington National") and Cortland Savings and Banking Company ("Cortland Savings") in 1991 prior to transferring the property to the Millers.^{FN1}

FN1. Although not relevant to this appeal, we would note that it is unclear how clean title to the property was passed between Summer and the Millers considering the existence of the prior mortgages.

When the Millers defaulted on their mortgage payments, appellee filed a complaint in the Portage County Court of Common Pleas seeking to foreclose on the property. In addition to the Millers, appellee also named Summer, Jane Doe (Summer's unknown spouse), Cortland Savings, appellant, and the State of Ohio, Department of Taxation, as defendants.^{FN2}

FN2. Despite the fact that Huntington National was a prior mortgage holder, appellee did not name the bank as a defendant.

Appellant filed an answer on April 11, 2000, denying the allegations in the complaint. On August 21, 2000, appellee filed a motion for summary judgment arguing that there was no genuine issue of material fact, and that the company was entitled to judgment as a matter of law.

In response, appellant filed an amended answer on September 15, 2000, in which it asserted a new claim for equitable subrogation. According to appellant, the loan given to Summer was to be secured with a mortgage replacing those already held by Huntington National and Cortland Savings. As a result, because the earlier mortgages were given prior to the one granted by the Millers to appellee, appellant believed that its mortgage interest was en-

titled to first priority.

On November 13, 2000, the trial court granted appellee's motion for summary judgment against Summer. Moreover, the court also dismissed the Millers, finding that the court lacked personal jurisdiction over the couple. As for the remaining defendants, the trial court concluded that their respective liens were not extinguished by the foreclosure action.

Both Summer and appellant filed motions for reconsideration from this judgment. Construing the motions for reconsideration as briefs in opposition to appellee's motion for summary judgment, the trial court issued a new judgment entry on March 15, 2001, affirming its earlier decision. In doing so, the trial court disagreed with Summer's argument that the consent judgment filed on March 13, 1998, effectively canceled appellee's mortgage on the property. Rather, the court concluded that because the mortgage predated both the filing of Summer's complaint and the consent judgment, appellee's mortgage was valid and enforceable.

*2 As for appellant, the trial court held that equitable subrogation should not be used to relieve the company of its own errors. According to the trial court, appellant, who was in complete control of the lien search, escrow, and disbursement of the loan funds, "simply missed [appellee's] mortgage[.]" and neither Summer nor appellee "made any representation to [appellant] that its lien would be given priority."

From this judgment, appellant filed a timely notice of appeal with this court. Under its sole assignment of error, appellant argues that summary judgment should not have been granted because, pursuant to the facts and circumstances of this case, it was entitled to relief under the doctrine of equitable subrogation. We disagree.

At the outset, we note that summary judgment is proper when: (1) there is no genuine issue as to any material fact; (2) the moving party is entitled to

judgment as a matter of law; and (3) reasonable minds can come but to one conclusion, and that conclusion is adverse to the party against whom the motion for summary judgment is made, that party being entitled to have the evidence construed most strongly in his favor. Civ.R. 56(C); *Leibreich v. A.J. Refrigeration, Inc.* (1993), 67 Ohio St.3d 266, 268, 617 N.E.2d 1068.

Material facts are those facts that might affect the outcome of the suit under the governing law of the case. *Turner v. Turner* (1993), 67 Ohio St.3d 337, 340, 617 N.E.2d 1123, citing *Anderson v. Liberty Lobby, Inc.* (1986), 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202. To determine what constitutes a genuine issue, the court must decide whether the evidence presents a sufficient disagreement to require submission to a jury, or whether it is so one-sided that one party must prevail as a matter of law. *Turner* at 340, 617 N.E.2d 1123.

The party seeking summary judgment on the ground that the nonmoving party cannot prove its case bears the initial burden of informing the trial court of the basis for the motion and of identifying those portions of the record that demonstrate the absence of a genuine issue of material fact on the essential elements of the nonmoving party's claims. *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 293, 662 N.E.2d 264. The moving party must be able to point specifically to some evidence of the type listed in Civ.R. 56(C) which affirmatively demonstrates that the nonmoving party has no evidence to support the nonmoving party's claim. *Dresher* at 293, 662 N.E.2d 264.

If the moving party fails to satisfy this initial burden, summary judgment should be denied. *Id.* However, if this initial burden is met, the nonmoving party has a reciprocal burden to respond, by affidavit or as otherwise provided in the rule, in an effort to demonstrate that there is a genuine issue of fact suitable for trial. *Id.* If the nonmoving party fails to do so, the trial court may enter summary judgment against that party if appropriate. *Id.*

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[1][2] Generally speaking, “[s]ubrogation is the ‘substitution of one person in the place of another with reference to a lawful claim or right.’” *Tower City Title Agency, LLC v. Flaisman* (Apr. 20, 2001), Lake App. No.2000-L-070, unreported, 2001 WL 409528, at 2, quoting *Fed. Home Loan Mtge. Corp. v. Moore* (Sept. 27, 1990), Franklin App. No. 90AP-546, unreported, 1990 WL 140556, at 2. Unlike conventional subrogation, which is premised on the contractual obligations of the parties, equitable subrogation “ ‘ * * * arises by operation of law when one having a liability or right or a fiduciary relation in the premises pays a debt due by another under such circumstances that he is in equity entitled to the security or obligation held by the creditor whom he has paid.’” *State v. Jones* (1980), 61 Ohio St.2d 99, 102, 399 N.E.2d 1215, quoting *Fed. Union Life Ins. Co. v. Deutsch* (1934), 127 Ohio St. 505, 510, 189 N.E. 440.

*3 As the Supreme Court of Ohio noted in *Jones*, “ * * * equity in the granting of relief by subrogation is largely concerned with and rests its interference, when called upon, on the prevention of frauds and relief against mistakes, and it is correctly stated that the right to it depends upon the facts and circumstances of each particular case. * * *” *Jones* at 102, 399 N.E.2d 1215, quoting *Canton Morris Plan Bank v. Most* (1932), 44 Ohio App. 180, 184, 184 N.E. 765. Accordingly, “[i]n order to entitle one to subrogation, his equity must be strong and his case clear.” *Jones* at 102, 399 N.E.2d 1215.

In *Jones*, Cleveland Federal Savings & Loan Association of Cuyahoga County (“Cleveland Federal”) agreed to refinance an earlier mortgage that had been given to the company by Bernard and Bonnie Jones (“the Jones”). Midland Title Security, Inc. (“Midland”) conducted a preliminary title search of the subject property in August 1976 which only revealed Cleveland Federal’s previous mortgage.

Shortly after this preliminary title search, the Internal Revenue Service filed a tax lien on the property on September 16, 1976. Four days later, Frank, Seringer & Chaney, C.P.A., filed two certificates of

judgment liens. Nevertheless, on September 21, 1976, Cleveland Federal executed a second mortgage on the property that was not filed until December 29, 1976.

Between the time of the execution and recording of the second mortgage, the State of Ohio, Department of Taxation, filed a certificate of judgment lien on the property. When Midland conducted an updated title search prior to the recording of the second mortgage, the company discovered the Internal Revenue Service tax lien and the two certificates of judgment liens. However, the state’s tax lien was neither discovered nor reported to Cleveland Federal before the second mortgage was filed. As a result, Cleveland Federal only satisfied the three discovered liens and the company’s own first mortgage.

When the state instituted foreclosure proceedings, Cleveland Federal was named as a defendant and maintained that its mortgage was entitled to priority over the state’s tax lien through equitable subrogation. In rejecting this argument, the Supreme Court of Ohio observed that it was Cleveland Federal’s “own actions [that] led to its dilemma of not obtaining the best priority lien.” *Jones* at 102, 399 N.E.2d 1215. According to the Court, because Cleveland Federal was in complete control of the refinancing application, the disbursement of the funds, the filling out of all the forms, the date of the filing, the hiring of the title company, and was aware of the debts to the Internal Revenue Service and the accounting firm, equitable subrogation would not be invoked to relieve Cleveland Federal from its “improvident business maneuvers.” *Id.* at 103, 399 N.E.2d 1215.

[3] After considering the totality of the facts and circumstances in this case, we conclude that the trial court did not err in denying appellant’s request for equitable subrogation. Clearly, when appellant’s agent conducted the title search, it failed to discover appellee’s preexisting mortgage. Furthermore, appellant was in complete control of the loan process, and there is no allegation that appellee acted

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fraudulently or otherwise tried to conceal its properly recorded mortgage from appellant.

*4 Appellant argues that because appellee willingly accepted an inferior lien position when the Millers gave the company a mortgage on the property, it has now been unjustly enriched by appellant's satisfaction of the preexisting mortgages. However, simply because appellant's negligence provided a benefit to appellee does not necessarily mean that appellee was unjustly enriched. Instead, if equitable subrogation were applied in the instant matter, an innocent third party, appellee, would be harmed.

[4] Equitable subrogation will not be used to benefit parties who were negligent in their business transactions, and who were obviously in the best position to protect their own interests. *Leppo, Inc. v. Kiefer* (Jan. 31, 2001), Summit App. Nos. 20097 and 20105, unreported, 2001 Ohio App. LEXIS 293, at 6. As a result, appellant's sole assignment of error is not well-taken.

Based on the foregoing analysis, the judgment of the trial court is affirmed.

O'NEILL, P.J., and NADER, J., concur.

Ohio App. 11 Dist., 2002.
Associates Financial Services Corp. v. Miller
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 (Cite as: 2001 WL 81262 (Ohio App. 9 Dist.))

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CHECK OHIO SUPREME COURT RULES FOR
 REPORTING OF OPINIONS AND WEIGHT OF
 LEGAL AUTHORITY.

Court of Appeals of Ohio, Ninth District, Summit
 County.

LEPPO, INC., Appellee,

v.

Joseph E. KIEFER, et al., Appellants,
 and

Summit Bank, Appellee.

Nos. 20097, 20105.

Jan. 31, 2001.

Appeal from Judgment Entered in the Court of
 Common Pleas, County of Summit, Ohio, Case No.
 CV 98 12 4982.

William S. Pidcock, and Joseph M. Zeglen, Attor-
 neys at Law, Canton, OH, for Leppo, Inc., appellee.

Bradley P. Toman, Attorney at Law, Cleveland,
 OH, for Norwest Mortgage, Inc., Joseph E. Kiefer,
 and Debra L. Stock Kiefer, appellants.

Alan Digirolamo, Attorney at Law, Akron, OH, for
 Summit Bank, appellee.

Robert A. Wood, and Maria Boccardi, Attorneys at
 Law, Cleveland, OH, for Midland Commerce
 Group, appellant.

DECISION AND JOURNAL ENTRY

BAIRD.

*1 Midland Commerce Group, Joseph and Debra
 Kiefer, and Norwest Mortgage appeal the determi-
 nation of lien priority in the forfeiture order of the
 Summit County Court of Common Pleas. This court

affirms.

I.

The parties stipulated to the following facts before
 the trial court. On February 10, 1996, Gregory and
 Laura Duncan purchased property at 92 Melbourne
 Avenue, Akron. On February 22, 1996, the
 Duncans gave a \$120,000 mortgage to Summit
 Bank, appellee herein. On August 15, 1996, the
 Duncans gave a \$25,000 mortgage to First National
 Bank of Ohio. Both the mortgage deeds were recor-
 ded within days of being signed. On May 4, 1998,
 Leppo, Inc. filed a judgment lien in the amount of
 \$4,491.98, with 18% per annum interest from Janu-
 ary 1, 1998. On June 12, 1998, Summit Bank also
 filed a judgment lien against Gregory Duncan's in-
 terest in the property in the amount of \$58,606.55
 plus interest from May 21, 1998.

On September 26, 1998, Joseph and Debra Kiefer
 entered into an agreement to purchase the property
 from the Duncans for \$150,000. On December 18,
 1998, the Duncans transferred the property by war-
 ranty deed to the Kiefers. On the same date, the
 Kiefers filed a mortgage deed for \$120,000 to se-
 cure a mortgage by Norwest Mortgage. Midland
 Title Security, Inc., a part of Midland Commerce
 Group, had performed a title search and issued title
 insurance on the property. Midland had determined
 that the property was encumbered by two debts: the
 Summit Bank mortgage with a payoff figure of
 \$121,752.00 and the First National Bank mortgage
 with a payoff figure of \$16,274.70.^{FN1} At the clos-
 ing, these respective encumbrances were paid off.
 Midland did not discover the judgment liens of
 either Leppo or Summit Bank.

FN1. There was also a federal tax lien in
 the amount of \$14,618.03, which Midland
 discovered during the title search. That lien
 was paid off prior to the closing, and is not
 an issue in this appeal.

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(Cite as: 2001 WL 81262 (Ohio App. 9 Dist.))

On December 18, 1998, Leppo filed a complaint in foreclosure against the Duncans and others to enforce Leppo's judgment lien. The various parties agreed to the stipulated facts recited above. However, Norwest asserted that its mortgage should have first priority because Norwest, in paying off the Summit Bank mortgage, obtained equitable subrogation of the rights initially held by Summit Bank pursuant to the mortgage.

On February 17, 2000, the trial court issued an order setting forth the priority of liens claimed by Leppo, Summit Bank, and Norwest Mortgage. The trial court determined that the Leppo judgment lien had first priority, the Summit Bank judgment lien had second priority, and that the Norwest mortgage had third priority. On April 28, 2000, the court issued an order of foreclosure requiring that the remaining encumbrances be paid off in the priority and amounts previously determined, after the payment of outstanding property taxes.

Midland filed a notice of appeal. Norwest and the Kiefers jointly filed a notice of appeal as well. The appeals were consolidated, and Midland jointly represents appellants' case. Appellants assign two errors.

II.

ASSIGNMENT OF ERROR I

THE TRIAL COURT ERRED IN FINDING THAT EQUITABLE SUBROGATION DOES NOT APPLY TO THE KIEFERS' AND [NORWEST] MORTGAGE, INC.'S FUNDS, AND IN TURN GIVING LIEN PRIORITY TO LEPP0, INC. AND SUMMIT BANK.

*2 Appellants propose that the trial court should have determined that when Norwest paid off the Summit Bank mortgage, which was the first priority encumbrance on the property, Norwest was stepping into the place of Summit Bank. Thus, by equitable subrogation, Norwest had first priority, the

same priority held by the Summit Bank mortgage previously.

Subrogation is the accession of a second party to rights that are held by another. See *State v. Jones* (1980), 61 Ohio St.2d 99, 100-101, citing *Aetna Cas. & Sur. Co. v. Hensgen* (1970), 22 Ohio St.2d 83. This can be accomplished by conventional subrogation, which arises by contract either express or implied, or by equitable or legal subrogation, *Jones*, 61 Ohio St.2d at 101. Equitable subrogation "arises by operation of law when one having a liability or right or a fiduciary relation in the premises pays a debt due by another under such circumstances that he is in equity entitled to the security or obligation held by the creditor whom he has paid." *Id.* at 102, quoting *Federal Union Life Ins. Co. v. Deitsch* (1934), 127 Ohio St. 505, 510. However, the primary purpose of equitable subrogation is to prevent unjust enrichment. *State Savings Bank v. Gunther* (1998), 127 Ohio App.3d 338, 346. Thus, "[i]n order to entitle one to subrogation, his equity must be strong and his case clear." *Jones*, 61 Ohio St.2d at 102. The applicability of equitable subrogation depends upon the facts and circumstances of each particular case.*Id.*

This court has found that it was inappropriate to apply the remedy of equitable subrogation where the party seeking equitable subrogation was guilty of culpable negligence. *State v. Jones* (Dec. 29, 1978), Lorain App. No. 2738, unreported, at 10. We have also held that equitable subrogation is not appropriate where the party seeking its application was in the best position to protect its own interest. *National City Bank v. Forsyth* (July 5, 1989), Summit App. No. 13992, unreported, at 4.

In the instant case it is clear that when conducting the title search Norwest's agent Midland negligently failed to discover two judgment liens of record. Furthermore, it is clear that the mortgage deed from the Kiefers to Norwest stated that the instant mortgage was issued subject to "encumbrances of record." Thus, it is clear that Norwest accepted the mortgage subject to encumbrances of record, but

that Midland had inaccurately advised Norwest that there were no encumbrances of record.

This error on the part of Norwest's agent Midland does not constitute a situation where Norwest has strong equity and a clear case to prevent the unjust enrichment of another.

This court cannot conclude that the trial court erred in determining that appellant Norwest's mortgage was not entitled to first priority in equitable subrogation to the former mortgage held by Summit Bank. Appellants' first assignment of error is overruled.

III.

ASSIGNMENT OF ERROR II:

*3 THE TRIAL COURT ERRED IN FINDING THAT THE NECESSARY ELEMENTS OF LACHES ARE NOT PRESENT AS APPLIED TO THE LIEN OF SUMMIT BANK.

Appellants argue that the Summit Bank judgment lien should not have priority over Norwest's mortgage lien because Summit Bank should have brought to Norwest's attention that Summit Bank also had a judgment lien on the property. Appellants assert that Summit Bank's failure to advise Norwest of the existing judgment lien should operate as laches to prevent Summit from obtaining priority over Norwest. This court disagrees.

"Laches is an omission to assert a right for an unreasonable and unexplained length of time, under circumstances prejudicial to the adverse party." *Connin v. Bailey* (1984), 15 Ohio St.3d 34, 35, quoting *Smith v. Smith* (1957), 107 Ohio App. 440, 443. Laches is a defense and if the defendant proves the elements of laches, the burden will shift to the plaintiff to explain the unreasonable delay in pursuing his right. *Stevens v. Natl. City Bank* (1989), 45 Ohio St.3d 276, 284-285, citing *Russell v. Fourth Natl. Bank* (1921), 102 Ohio St. 248, 268. The elements of laches are:

(1) conduct on the part of the defendant giving rise to the situation of which complaint is made and for which the complainant seeks a remedy; (2) delay in asserting the complainant's rights, the complainant having had knowledge or notice of defendant's conduct and having been afforded an opportunity to institute a suit; (3) lack of knowledge or notice on the part of the defendant that the complainant would assert the right on which he bases his suit; and (4) injury or prejudice to the defendant in the event relief is accorded to the complainant.

Stevens, 45 Ohio St.3d at 285, citing *Smith*, 168 Ohio St. at 455.

In the instant case, only the fourth element is established, namely that failure of the court to grant relief will injure the appellants. Most especially, appellants cannot prevail on either the element of unreasonable delay by Summit Bank or appellants' lack of knowledge that Summit Bank had a judgment lien that it might seek to enforce. The parties stipulated that Norwest paid off Summit Bank's mortgage at the closing. Appellants argue that when Summit Bank was called to provide the payoff figure to Norwest, Summit should have advised Norwest of the Summit Bank judgment lien on the property. There is no evidence that the Summit Bank employee who provided the mortgage payoff figure was aware or should have been aware that Summit also had a judgement lien on the property.

Furthermore, there is no evidence that Summit Bank had a duty to inform Norwest about the judgment lien, even if that information was available to Summit's mortgage payoff clerk. Clearly, Norwest had conducted a sufficient title search to determine that Summit Bank was a mortgage holder on the property. There was no reason for Summit Bank to assume anything other than that Norwest had thoroughly searched the title to find encumbrances of record, as it had found the Summit Bank mortgage. Appellants have suggested no reason why Summit Bank would advise a prospective mortgage lender of the state of the title, albeit a title which included

another encumbrance by Summit Bank.

App. 9 Dist.)

*4 Finally, it is undisputed that the liens at issue here were matters of public record. Where an encumbrance is a matter of public record, constructive knowledge of the encumbrance is presumed. See *Tiller v. Hinton* (1985), 19 Ohio St.3d 66. Norwest is deemed to have constructive notice of the Summit Bank judgment lien, which was a matter of record.

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Because appellants did not prove the elements of laches, the trial court correctly determined that the defense of laches does not apply to the instant case. Appellants' second assignment of error is meritless, and it is overruled.

IV.

Having overruled appellants' assignments of error, we affirm the judgment of the trial court.

Judgment affirmed.

The Court finds that there were reasonable grounds for these appeals.

We order that a special mandate issue out of this Court, directing the County of Summit, Court of Common Pleas, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E).

Costs taxed to Appellants.

Exceptions.

BATCHELDER, P.J., and WHITMORE, J., concur.
Ohio App. 9 Dist., 2001.
Leppo, Inc. v. Kiefer
Not Reported in N.E.2d, 2001 WL 81262 (Ohio

FILED

MAY 06 2009

CLERK OF COURT
SUPREME COURT OF OH

The Supreme Court of Ohio

ABN AMRO Mortgage Group, Inc.

Case No. 2009-0553

v.

ENTRY

Jacob Kangah et al.

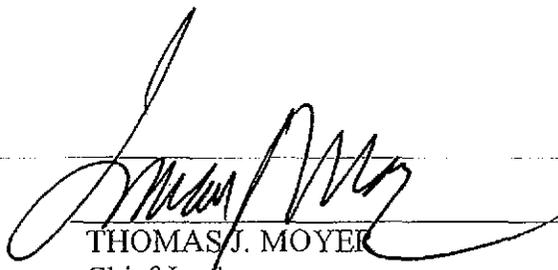
This cause is pending before the Court on the certification of a conflict by the Court of Appeals for Cuyahoga County. On review of the order certifying a conflict,

It is determined that a conflict exists. The parties are to brief the issue stated in the court of appeals' Journal Entry filed March 18, 2009, as follows:

“Whether the doctrine of equitable subrogation applies when a prior lien is satisfied with loan proceeds and (1) the party asserting the doctrine intended to hold the first and best lien, and (2) the competing lienholder had the expectation that its interest would be junior at the time that it received its interest, where the party asserting the doctrine has no actual knowledge of the competing lien due to its mistake or the mistake of a third party.”

It is ordered by the Court that the Clerk shall issue an order for the transmittal of the record from the Court of Appeals for Cuyahoga County.

(Cuyahoga County Court of Appeals; No. 91401)


THOMAS J. MOYER
Chief Justice



50764988

IN THE COURT OF COMMON PLEAS CUYAHOGA COUNTY, OHIO

ABN AMRO MORT. GROUP, INC.
Plaintiff

JACOB KANGAH ETAL
Defendant

Case No: CV-06-606632

Judge: PETER J CORRIGAN

JOURNAL ENTRY

P1 ABN AMRO MORTGAGE GROUP INC MOTION FOR SUMMARY JUDGMENT ON THE ISSUE OF PRIORITY ANN M JOHNSON 0072981, FILED 08/01/2007, IS GRANTED BASED ON THE DOCTRINE OF EQUITABLE SUBROGATION. EQUITABLE SUBROGATION IS ESSENTIALLY A THEORY OF UNJUST ENRICHMENT AND MAY DEFEAT THE STATUTORY RULE OF FIRST IN TIME, FIRST IN RIGHT. IN THIS CASE, PLAINTIFF PAID THE FIRST MORTGAGE LIEN AND TAXES WHEN DEFENDANT JACOB KANGAH REFINANCED THE SUBJECT PROPERTY. DEFENDANT CUYAHOGA COUNTY DEPARTMENT OF DEVELOPMENT (CCDOD) HELD A SUBORDINATE MORTGAGE AND SHOULD NOT BE UNJUSTLY ENRICHED BEYOND THE VALUE OF THE ORIGINAL FIRST MORTGAGE. ACCORDINGLY, PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT IS GRANTED. NO JUST CAUSE FOR DELAY.

Judge Signature 04/07/2008
CPTSG

THE STATE OF OHIO }
 Cuyahoga County } I, GERALD E. FUERST, CLERK OF
 } SS, THE COURT OF COMMON PLEAS
 WITHIN AND FOR SAID COUNTY
 HEREBY CERTIFY THAT THE ABOVE AND FOREGOING
 TAKEN AND COPIED FROM THE ORIGINAL
 FILED IN MY OFFICE.
 NOW ON FILE IN MY OFFICE.
 WITNESS MY HAND AND SEAL OF SAID COURT THIS
 DAY OF May A.D. 2008
 GERALD E. FUERST, CLERK
 By [Signature] Clerk

Filed April 8, 2008

03/31/2008

RECEIVED FOR FILING
04/08/2008 08:55:16
By: CLTMP
GERALD E. FUERST, CLERK

COURT OF COMMON PLEAS

FILED

CUYAHOGA COUNTY, OHIO

2008 APR 15 A 10:29

ABN AMRO MORTGAGE GROUP, INC.

Plaintiff

-vs-

JACOB KANGAH et al.

Defendants

CASE NO.: CV06606632

JUDGE: PETER J. CORRIGAN

GERALD E. FUERST
CLERK OF COURTS
CUYAHOGA COUNTY

MAGISTRATE'S DECISION

THIS CAUSE was submitted to the Magistrate and heard upon the Complaint, Motion for Default Judgment, the unopposed Motion for Summary Judgment of the Plaintiff and the Affidavit and Exhibits in support thereof, the Answer of Defendants, Jacob Kangah and Ivory Kangah, the Answer and Cross Claim of Defendant, Navy Federal Credit Union, the Answer and Cross Claim of Defendant, Ohio Department of Development, Cuyahoga County, and the evidence.

The Magistrate finds that reasonable minds can come to but one conclusion which is adverse to the Defendants, Jacob Kangah and Ivory Kangah. Therefore, it is Ordered that the Plaintiff's Motion for Summary Judgment is granted.

The Magistrate finds that all necessary parties have been served with summons according to law and are properly before the Court.

The Magistrate finds that there is due the Treasurer of Cuyahoga County, Ohio, taxes, accrued taxes, assessments and penalties on the premises hereinafter described, as shown on the County Treasurer's tax duplicate, the exact amount being unascertainable at the present time, but which amount will be ascertainable at the time of sale, which are a valid and subsisting lien thereon for that amount so owing.

The Magistrate finds on the evidence adduced that there is due the Plaintiff on the promissory note set forth in the First Count of the Complaint, the sum of \$71,787.09 plus interest thereon at the rate of 6.50% per annum from July 1, 2006, for which sum judgment is hereby rendered in favor of the Plaintiff against the Defendants, Jacob Kangah.

The Magistrate finds that there may be due to Plaintiff sums advanced by it under the terms of the note and mortgage to pay real estate taxes, insurance premiums and property protection, which sums are to be determined by further Order.

The Magistrate further finds that, to secure the payment of the promissory note aforesaid, Jacob Kangah, A Married Man, executed and delivered a certain mortgage deed as in the Second Count of the said Complaint described, thereby conveying to Abn Amro Mortgage Group, Inc. the following described premises:

See attached Legal Description marked Exhibit "A".

Said premises also known as: 20617 Libby Road, Maple Heights, OH 44137

Permanent Parcel Number: 782-23-088

That said mortgage was duly filed with the Recorder of Cuyahoga County on June 19, 2001, and was by him thereafter recorded in Instrument No. 200106190755, of the Mortgage Records of said County, and thereby became and is a valid mortgage lien upon said premises, subject to the lien of the Treasurer for taxes; that said conditions in the mortgage deed have been broken and the same has become absolute and the Plaintiff is entitled to have the equity of redemption and dower of all the Defendants in and to said premises foreclosed.

While finding that there is no just reason for delay as to the Plaintiff's claim, the Magistrate makes no finding at this time as to the claim, right, title, interest, lien, or claim of the Defendant, Navy Federal Credit Union, as set forth in the pleadings filed herein, except to note that such claim, right, title, interest, lien, or claim of the hereinabove Defendant ^(s) is hereby ordered transferred to the proceeds derived from the sale of said premises, after the payment of the costs of the within action, taxes due and payable and the amount hereinabove found due the Plaintiff, and the same is hereby ordered continued until the further order of the Court.

It is therefore ORDERED, ADJUDGED AND DECREED that, unless the sums hereinabove found due, together with the costs of this action, be fully paid within three (3) days from the date of the Court's adoption of the Magistrate's Decision, there shall be no further equity of redemption, and the dower of all the Defendants in and to said premises shall be foreclosed, and said premises sold; that, only upon the issuance of a Praeceptum for Order of Sale by Plaintiff's attorney, shall an order of sale thereafter issue to the Sheriff of Cuyahoga County, directing him to appraise, advertise in a paper of general circulation within the County, and sell said premises as upon execution and according to law, free and clear of the interest of all parties to this action.

It is further ordered that, in the event an order of sale is returned by the Sheriff unexecuted, subsequent orders of sale shall issue in accordance with appraisal instructions written in the Praecipe Book.

And, coming now to distribute the proceeds of said sale, it is ordered that the Sheriff out of the funds in his hands pay:

- FIRST: The costs herein, including the sum of \$200.00 payable to Shapiro & Felty, L.L.P. for the Judicial Report filed herein, and the sum of \$80.00 for the premium, which are hereby taxed as costs.
- SECOND: To the Treasurer of Cuyahoga County, the unpaid taxes, assessments, interest and penalties due and payable on said premises.
- ~~THIRD:~~ The balance, if any, to be held by the Sheriff, pending further order.
- FOURTH:*

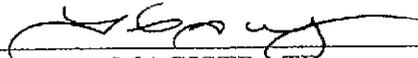
It is further ORDERED ADJUDGED AND DECREED that, upon the confirmation of sale made herein, a minute of these proceedings be entered upon the Cuyahoga County Records involved in these actions, namely, the mortgage of the Plaintiff recorded in Instrument No. 200106190755, the lien of Navy Federal Credit Union recorded on February 19, 2002 in Instrument No. 200202191346 and the lien of Ohio Department of Development, Cuyahoga County recorded on July 12, 2000 in Instrument No. 200007120323 be released as a ~~liens against the subject premises, and that all parties of this action be perpetually barred from~~ asserting any lien or rights upon the premises to the purchaser hereof, or anyone claiming under or through said purchaser, and subject to the further order.

It is further ORDERED, ADJUDGED AND DECREED that, after said sale has been completed, the Sheriff of Cuyahoga County convey to the purchaser said real property and that a Writ of Possession of said property be issued.

THIRD: TO THE PLAINTIFF, THE SUM OF \$ 20,067.65 PLUS INTEREST OF 6.5% PER ANNUM FROM JULY 1, 2006.

It is further ORDERED, ADJUDGED AND DECREED that, in the event the Plaintiff is found to have the first and best lien, should the Plaintiff be the successful bidder at the Sheriff's sale, the deposit required under Rule 27 of the Cuyahoga County Common Pleas Court Rules is hereby waived; the Plaintiff lien holder shall not be required to make a deposit at the time of sale, but shall pay all costs, taxes, and assessments upon presentment of a statement from the Cuyahoga County Sheriff. Also, in the event Plaintiff is the successful bidder at the Sheriff's sale, the amount of the deposits made herein by Plaintiff and the cost of the Preliminary Judicial Report in the sum of \$280.00, shall be deducted from the total amount of Court costs otherwise payable herein.

RECORD IS HEREBY ORDERED.


MAGISTRATE

A PARTY SHALL NOT ASSIGN AS ERROR ON APPEAL THE COURT'S ADOPTION OF ANY FINDING OF FACT OR CONCLUSION OF LAW UNLESS THE PARTY TIMELY AND SPECIFICALLY OBJECTS TO THAT FINDING OR CONCLUSION AS REQUIRED BY CIV.R.53(E)(3).

(D)

06-62191D; nk; April 1, 2008

CERTIFICATE OF SERVICE

Copies of the foregoing have been sent by Ordinary U.S. Mail, by the Clerk of Courts to the following parties or their counsel of record:

Christian E. Niklas, Esq.
Shapiro & Felty, L.L.P.
Attorney for Plaintiff
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Cleveland, Oh 44114-1903
Attorney for Defendants
Jacob Kangah
and Ivory Kangah

Paul M. Nalepka, Esq.
P.O. Box 5480
Cincinnati, OH 45201-5480
Attorney for Defendant
Navy Federal Credit Union

✓ Gregory B. Rowinski, Esq.
Courts Tower-Eighth Floor
1200 Ontario Street
Cleveland, OH 44113
Attorney for Defendant
Ohio Department of Development
Cuyahoga County

Copies Mailed by Clerk: _____
(Date)

CLERK OF COURTS

Exhibit A

Legal Description

File Number: 01-05061

Situated in the City of Maple Heights, County of Cuyahoga and State of Ohio:
And known as Sublot NO. 12 in Waid and Duffey's Center Highway Allotment No. 3 of part
of Original Bedford Township Lot No. 6, as shown by the recorded plat in Volume 95 of
Maps, page 10 of Cuyahoga County Records, as appears by said plat be the same more or
less, but subject to all legal highways.

✓ PPN: 782-23-088

Also Known As: 20617 Libby Road
Mapple Heights, Ohio 44137

End Of Legal Description

CUYAHOGA COUNTY RECORDER
200106190755 PAGE 2 of 9



57184345

**IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO**

ABN AMRO MORT. GROUP, INC.
Plaintiff

JACOB KANGAH ETAL
Defendant

Case No: CV-06-606632

Judge: PETER J CORRIGAN



JOURNAL ENTRY

96 DISP.OTHER - FINAL

THE OBJECTION TO THE MAGISTRATE'S DECISION WAS OVERRULED AND SAID DECISION WAS AFFIRMED BY THE COURT OF APPEALS. BY THIS SEPARATE AND DISTINCT INSTRUMENT, THE COURT ADOPTS THE MAGISTRATE'S DECISION, DATED APRIL 15, 2008, ATTACHED HERETO AND INCORPORATED HEREIN. THE COURT GRANTS THE FOLLOWING RELIEF ON THE ISSUES ORIGINALLY SUBMITTED TO THE COURT. JUDGMENT FOR PLAINTIFF AGAINST DEFENDANT JACOB KANGAH IN THE SUM OF \$71,787.09 WITH INTEREST THEREON AT THE RATE OF 6.5% PER ANNUM FROM JULY 1, 2006. DECREE OF FORECLOSURE FOR PLAINTIFF.

PLAINTIFF MAY ORDER TO SHERIFF'S SALE THE PROPERTY LOCATED AT 20617 LIBBY ROAD, MAPLE HEIGHTS, OHIO. PPN: 782-23-088.

PURSUANT TO CIV. R. 54(B) THE COURT FINDS THERE IS NO JUST CAUSE FOR DELAY.

[Handwritten Signature] 4/28/09

Judge Signature Date
CPTSC *[Handwritten Initials]*

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APR 29 2009

APR 27 2009

GERALD E. FLURST, CLERK
By *[Handwritten Signature]* Deputy

5301.23 Mortgage effective dates.

(A) All properly executed mortgages shall be recorded in the office of the county recorder of the county in which the mortgaged premises are situated and shall take effect at the time they are delivered to the recorder for record. If two or more mortgages pertaining to the same premises are presented for record on the same day, they shall take effect in the order of their presentation. The first mortgage presented shall be the first recorded, and the first mortgage recorded shall have preference.

(B) A mortgage that is presented for record shall contain the then current mailing address of the mortgagee. The omission of this address or the inclusion of an incorrect address shall not affect the validity of the instrument or render it ineffective for purposes of constructive notice.

Effective Date: 01-01-1994