

**IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO**

MOREQUITY, INC.,	:	APPEAL NO. C-080824
	:	TRIAL NO. A-0604081
Plaintiff-Appellant,	:	
vs.	:	<i>DECISION.</i>
FIFTH THIRD BANK,	:	
Defendant-Appellee,	:	
and	:	
TERRENCE P. FINLEY,	:	
THE UNKNOWN HEIRS, DEVISEES,	:	
LEGATEES, ADMINISTRATORS,	:	
EXECUTORS AND ASSIGNS OF	:	
TERRENCE P. FINLEY, DECEASED,	:	
ALISA A. FINLEY,	:	
THE UNKNOWN HEIRS, DEVISEES,	:	
LEGATEES, ADMINISTRATORS,	:	
EXECUTORS AND ASSIGNS OF	:	
ALISA A. FINLEY, DECEASED,	:	
TREASURER OF HAMILTON	:	
COUNTY,	:	
and	:	
AUDITOR OF HAMILTON COUNTY,	:	
Defendants.	:	

OHIO FIRST DISTRICT COURT OF APPEALS

Civil Appeal From: Hamilton County Court of Common Pleas

Judgment Appealed From Is: Affirmed

Date of Judgment Entry on Appeal: June 12, 2009

Steven E. Elder Co., LPA, Steven E. Elder, and Michelle L. Polly-Murphy, for Plaintiff-Appellant,

Graydon Head & Ritchey LLP, Harry W. Cappel, and Nathan H. Blaske, for Defendant-Appellee.

Please note: This case has been removed from the accelerated calendar.

DINKELACKER, Judge.

{¶1} Plaintiff-appellant Morequity, Inc., (“Morequity”) has appealed from the trial court’s grant of partial summary judgment to defendant-appellee Fifth Third Bank in Morequity’s foreclosure action.

{¶2} Morequity raises two assignments of error on appeal. It first argues that the trial court abused its discretion in failing to adopt the decision of the common pleas magistrate. We recast Morequity’s second assignment of error to reflect its argument: that the trial court erred in granting partial summary judgment to Fifth Third based on its determination that the doctrines of equitable subrogation and estoppel were not applicable to this case.

{¶3} For the following reasons, the judgment of the trial court is affirmed.

Property’s Mortgage History

{¶4} Defendants Terrence and Alisa Finley granted a mortgage to Fifth Third Bank regarding the property located at 1372 Wexford Lane in Cincinnati. This mortgage secured a loan for \$267,500 and was recorded on August 13, 2003. The Finleys obtained additional financing from Fifth Third for this property in March of 2004. Fifth Third issued the Finleys an Equity Flexline, which was secured by an Open-End Mortgage on the Wexford property. This Open-End Mortgage allowed the Finleys to borrow up to an additional \$75,000 and was recorded on March 10, 2004.

{¶5} The Finleys refinanced their mortgage in November of 2004 with Wilmington Finance. In connection with the new mortgage, Wilmington Finance issued \$365,000 to the Finleys. A portion of this loan was used to pay off the balance on both Fifth Third’s initial mortgage and its Equity Flexline Open-End

Mortgage. Fifth Third's mortgage recorded in August of 2003 was closed out, but Fifth Third was never explicitly directed to close the Equity Flexline Open-End Mortgage. And it is undisputed that Wilmington Finance never provided Fifth Third with the required notice of its mortgage under R.C. 5301.232(D). As a result, the Open-End Mortgage was never closed.

{¶6} Wilmington Finance recorded its mortgage on November 17, 2004. Morequity was subsequently assigned this mortgage, and hereinafter we refer to the mortgage issued by Wilmington Finance as Morequity's mortgage. Following the issuance of Morequity's mortgage, the Finleys borrowed approximately \$75,000 more on their Equity Flexline from Fifth Third.

{¶7} The Finleys defaulted on their mortgage payments to Morequity, and Morequity initiated this foreclosure action. Both Morequity and Fifth Third asserted that their respective mortgages were entitled to priority.

{¶8} A common pleas magistrate granted partial summary judgment to Morequity, determining that its mortgage was entitled to priority over Fifth Third's Open-End Mortgage based on the doctrine of equitable subrogation. But the trial court disagreed and granted partial summary judgment to Fifth Third.

{¶9} This appeal followed. For ease of discussion, we consider the assignments of error raised by Morequity out of order.

Equitable Subrogation

{¶10} As we have stated, we have recast Morequity's second assignment of error to assert that the trial court erred in granting partial summary judgment to Fifth Third, because the doctrines of equitable subrogation and estoppel/unjust enrichment gave priority to Morequity's mortgage.

{¶11} This court reviews a grant of summary judgment de novo.¹ Summary judgment is appropriately granted when there exist no genuine issues of material fact, the movant is entitled to judgment as a matter of law, and the evidence, when viewed in favor of the nonmoving party, permits only one reasonable conclusion that is adverse to the nonmoving party.²

{¶12} Generally, a mortgage first recorded has priority over mortgages recorded later in time.³ But the doctrine of equitable subrogation may be used in certain situations to overcome this rule of first in time, first in right. As this court has stated, 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.”⁴

{¶13} To successfully rely on the doctrine of equitable subrogation, a party must demonstrate that its equity is strong and its case is clear.⁵ A party is not entitled to equitable subrogation if that party has failed to act in accordance with ordinary and reasonable business practices to establish priority.⁶

{¶14} Morequity asserts that it was entitled to equitable subrogation because both of Fifth Third’s prior mortgages were paid off at the time that the Morequity mortgage was issued. It further posits that Fifth Third’s Open-End Mortgage had been issued as a second mortgage, and, consequently, that Fifth Third had never

¹ *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105, 1996-Ohio-336, 671 N.E.2d 241.

² *State ex rel. Howard v. Ferreri*, 70 Ohio St.3d 587, 589, 1994-Ohio-130, 639 N.E.2d 1189.

³ *Old Republic Natl. Title Ins. Co. v. Fifth Third Bank*, 1st Dist. No. C-070567, 2008-Ohio-2059, ¶11.

⁴ *Id.* at ¶12; accord *Federal Union Life Ins. Co. v. Deitsch* (1934), 127 Ohio St. 505, 510, 189 N.E. 440.

⁵ *Id.*; accord *Harshman v. Harshman* (1941), 35 Ohio Law Abs. 633, 636, 42 N.E.2d 447.

⁶ *Id.* at ¶13.

expected that mortgage to have priority. Morequity additionally urges this court to conclude that any error relating to the failure to issue Fifth Third the required statutory notice of its mortgage under R.C. 5301.232(D) was the fault of the title company and cannot be imputed to Morequity.

{¶15} Following our review of the record, we cannot conclude that Morequity was entitled to equitable subrogation in the case at bar. Although Fifth Third's Open-End Mortgage was issued as a second mortgage, it gained priority when Fifth Third's first mortgage was paid off and closed. In this situation, the fact that the mortgage was not issued with the expectation of having first priority did not prevent the mortgage from later gaining that priority.

{¶16} Morequity cannot shift blame onto the title company in this situation. Morequity was aware of the existence of Fifth Third's Open-End Mortgage and failed to take the necessary steps to ensure that the mortgage was properly closed. We find this situation easily distinguishable from those in which a title company failed to discover a prior mortgage in its property search.⁷ In such cases, the lender was never aware of the prior mortgage.

{¶17} We find this case analogous to the facts of *Washington Mut. Bank v. Loveland*.⁸ In *Loveland*, Fifth Third Bank had been issued a first mortgage on property owned by Steven and Deborah Loveland. Fifth Third further received from the Lovelands a second mortgage on the same property. This second mortgage represented an equity line of credit. Washington Mutual Bank subsequently issued the Lovelands a loan and retained a mortgage on the property. Proceeds from

⁷ See *Washington Mut. Bank v. Aultman*, 172 Ohio App.3d 584, 2007-Ohio-3706, 876 N.E.2d 617, ¶41. See, also, *Fed. Home Loan Mtge. Corp. v. Moore* (Sept. 27, 1990), 10th Dist. No. 90AP-546.

⁸ 10th Dist. No. 04AP-920, 2005-Ohio-1542.

Washington Mutual's loan were used to pay off Fifth Third's first and second mortgages.⁹ But Fifth Third was not properly directed to close the equity line of credit, and it remained open.¹⁰ The Lovelands later borrowed more money on this line of credit. The Lovelands defaulted on their payments to Washington Mutual, and foreclosure proceedings were initiated. Washington Mutual argued that its mortgage was entitled to priority under the doctrine of equitable subrogation because Fifth Third had been negligent in failing to close the equity line of credit.

{¶18} The Tenth Appellate District determined that equitable subrogation was not appropriate.¹¹ The court first determined that Washington Mutual had failed to comply with R.C. 5301.232(D) regarding the required written notice to be issued to the holder of the open-end mortgage.¹² It further stated that “appellant has not demonstrated that its equity is strong and its case clear. Appellant was in the best position to secure its interests and assure that Fifth Third actually closed the home equity line, however, it failed to follow the proper procedures to have the account closed or to confirm that the equity line had been closed and properly released to ensure that it had first priority in the public records.”¹³

{¶19} We are persuaded by the Tenth Appellate District's reasoning. In this case, Morequity was in the best position to ensure that Fifth Third closed out the equity line of credit. Morequity knew of the existence of the Open-End Mortgage, but it failed to act in conformance with reasonable business practices to ensure that the mortgage was formally closed out. Under such circumstances, Morequity was not entitled to equitable subrogation.

⁹ Id. at ¶2.

¹⁰ Id. at ¶12.

¹¹ Id. at ¶17.

¹² Id. at ¶14.

¹³ Id. at ¶17.

{¶20} Accordingly, we conclude that the trial court did not err in determining that the doctrine of equitable subrogation was inapplicable.

Unjust Enrichment

{¶21} Morequity further argues in its second assignment of error that the trial court erred in granting partial summary judgment to Fifth Third, because the doctrine of unjust enrichment entitled Morequity's mortgage to priority over Fifth Third's Open-End Mortgage.

{¶22} Unjust enrichment occurs where “a person has and retains money or benefits which in justice and in equity belong to another.”¹⁴ To successfully establish that a party has been unjustly enriched, a plaintiff must demonstrate “a benefit conferred by a plaintiff upon a defendant; (2) knowledge by the defendant of the benefit; and (3) retention of the benefit by the defendant under circumstances where it would be unjust to do so without payment.”¹⁵

{¶23} In this case, Fifth Third was not unjustly enriched. Although the balance had been paid off on Fifth Third's Open-End Mortgage, the mortgage lawfully remained open because Morequity had failed to comply with the notice provisions in R.C. 5301.232(D) despite its knowledge of the mortgage's existence. In these circumstances, Fifth Third did not retain a benefit under circumstances that made it unjust.¹⁶

{¶24} In summary, both the doctrines of unjust enrichment and equitable subrogation were inapplicable in this case. The trial court did not err in granting

¹⁴ *Smith v. Vaughn*, 174 Ohio App.3d 473, 2007-Ohio-7061, 882 N.E.2d 941, ¶10; accord *Hummel v. Hummel* (1938), 133 Ohio St. 520, 528, 14 N.E.2d 923.

¹⁵ *Id.*; accord *Hambleton v. R.G. Barry Corp.* (1984), 12 Ohio St.3d 179, 183, 465 N.E.2d 1298.

¹⁶ See *Bank of New York v. Fifth Third Bank of Central Ohio*, 5th Dist. No. 01 CAE 03005, 2002-Ohio-352.

partial summary judgment to Fifth Third, and Morequity's second assignment of error is overruled.

{¶25} In its first assignment of error, Morequity argues that the trial court abused its discretion in failing to adopt the decision of the magistrate, which had determined that equitable subrogation gave priority to Morequity's mortgage.

{¶26} But because we have already determined that the trial court properly granted partial summary judgment to Fifth Third, we further determine that, as a matter of law, the court did not err in sustaining the objections to the magistrate's decision.

{¶27} The first assignment of error is overruled, and the judgment of the trial court is, accordingly, affirmed.

Judgment affirmed.

HILDEBRANDT, P.J., and CUNNINGHAM, J., concur.

Please Note:

The court has recorded its own entry on the date of the release of this decision.