

**IN THE COURT OF APPEALS
ELEVENTH APPELLATE DISTRICT
GEAUGA COUNTY, OHIO**

COUNTRYWIDE HOME LOANS, INC.,	:	O P I N I O N
	:	
Plaintiff-Appellee,	:	CASE NO. 2010-G-2969
	:	
- vs -	:	
	:	
ROBIN F. KORB, et al.,	:	
	:	
Defendants,	:	
	:	
RBS CITIZENS, N.A., SUCCESSOR BY MERGER TO CHARTER ONE BANK, N.A.,	:	
	:	
Defendant-Appellant.	:	

Civil Appeal from the Geauga County Court of Common Pleas, Case No. 08 M 000315.

Judgment: Affirmed.

Michael J. Sikora, III, and Lee R. Schroeder, Sikora Law, L.L.C., 8532 Mentor Avenue, Mentor, OH 44060 (For Plaintiff-Appellee).

Pamela s. Petas, Franco M. Barile, and Scott E. Collister, Gerner & Kearns Co., L.P.A., 215 West Ninth Street, Cincinnati, OH 45202 (For Defendant-Appellant).

DIANE V. GRENDALL, J.

{¶1} Defendant-appellant, RBS Citizens, N.A., successor by merger to Charter One Bank, N.A. (RBS), appeals the Judgment Entry of the Geauga County Court of Common Pleas, in which the trial court granted plaintiff-appellee, Countrywide Home

Loans, Inc.'s (Countrywide) Motion for Summary Judgment. For the following reasons, we affirm the decision of the trial court.

{¶2} On April 16, 2003, Robin and David Korb executed a promissory note in the amount of \$156,800, secured by a mortgage on the Korbs' real property, located at 13331 Caves Road, in Chesterland, Ohio. This mortgage was executed in favor of Mortgage Electronic Registration Systems, Inc. (MERS), and was recorded on April 16, 2003.

{¶3} On May 8, 2004, the Korbs executed an Open-End Mortgage on the same property, in favor of Charter One Bank, for \$39,900. This mortgage was recorded on May 27, 2004. Subsequently, Charter One was acquired by RBS in a merger, making RBS successor to the mortgage.

{¶4} On October 31, 2005, the Korbs refinanced the property through a mortgage and note to Guaranteed Rate, Inc., in the amount of \$196,000. This mortgage was subsequently assigned to Countrywide. Lakeside Title and Escrow Agency, Inc. (Lakeside) provided closing and escrow services in connection with this refinancing transaction. Upon closing, Lakeside disbursed funds in the amount of \$152,657.74 to satisfy the Korbs' April 16, 2003 MERS mortgage and \$39,486.97 to satisfy the Korbs' May 8, 2004 RBS mortgage.

{¶5} On March 19, 2008, Countrywide filed a Complaint against the Korbs and Charter One Bank, the owner of the RBS mortgage prior to its merger with RBS, seeking to foreclose on the October 31, 2005 Countrywide mortgage on the Korbs' property. Countrywide asserted that the Korbs owed \$191,498 on the October 31, 2005

promissory note. Countrywide also asserted that it should be found that Countrywide, not RBS, has the first and best lien on the Korbs' property.

{¶6} On April 3, 2008, RBS filed a Complaint against the Korbs and also requested foreclosure on the Korbs' property. The RBS and Countrywide cases were consolidated by the trial court on May 6, 2008.

{¶7} On April 25, 2008, RBS filed an Answer to Countrywide's Complaint, asserting that RBS has "the first and best lien" on the Korbs' property, based on the May 8, 2004 RBS mortgage being recorded prior to the Countrywide mortgage.

{¶8} On October 6, 2008, Countrywide filed an Amended Complaint and added Lakeside as a third party defendant. Countrywide asserted that Lakeside acted negligently in failing to handle the transaction of satisfying the RBS mortgage and failed to obtain a release of the mortgage from RBS. Countrywide argued that this negligence caused harm, including "the potential loss of [Countrywide's] priority position."

{¶9} On July 21, 2009, Countrywide filed a Supplemental Motion for Summary Judgment, asserting that, as a matter of law, the Countrywide mortgage had priority over the RBS mortgage, because of the doctrine of equitable subrogation. Countrywide argued that it should have the first lien position, but only in the amount of \$152,657.74, which was the amount owed by the Korbs on the MERS mortgage. Regarding the difference between the amount of the MERS mortgage, \$152,657.74, and the total owed by the Korbs' on the Countrywide mortgage, \$191,498, Countrywide conceded that this amount was not first in time and that Countrywide was not seeking a ruling of priority as to this amount.

{¶10} Countrywide asserted, through pleadings, that upon paying off the Korbs' RBS mortgage, RBS was to sign a release that the RBS mortgage was satisfied by the Countrywide mortgage proceeds. This would allow Countrywide to have the first and best lien on the Korbs' property. However, although RBS received payment from Lakeside, on behalf of Countrywide, to satisfy the RBS mortgage, RBS did not sign such a release. RBS asserts that it was not requested to do so by Lakeside. Additionally, RBS stated that Robin Korb instructed RBS to keep her account open. Although the original May 8, 2004 RBS mortgage was paid with proceeds from the Countrywide mortgage, RBS continued to advance the Korbs money from their RBS account.

{¶11} On April 15, 2010, the trial court granted summary judgment as to Countrywide's claim that its mortgage lien had priority over RBS' mortgage lien. The court found that "the mortgage currently held by Countrywide was intended to and did take the place of the 2003 mortgage originally held by [MERS]," and that the RBS mortgage was subordinate to the MERS mortgage and should therefore remain subordinate to Countrywide's mortgage.

{¶12} RBS timely appeals and asserts the following assignment of error:

{¶13} "The trial court erred in granting plaintiff-appellee's motion for summary judgment against defendant-appellant, RBS Citizens N.A., successor by merger to Charter One Bank N.A."

{¶14} Pursuant to Civil Rule 56(C), summary judgment is proper when (1) the evidence shows "that there is no genuine issue as to any material fact" 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 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 the party's favor." A trial court's decision to grant summary judgment is reviewed by an appellate court under a de novo standard of review. *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105, 1996-Ohio-336. An appellate court must independently review the record to determine if summary judgment was appropriate. Therefore, an appellate court affords no deference to the trial court's decision while making its own judgment. *Schwartz v. Bank One, Portsmouth, N.A.* (1992), 84 Ohio App.3d 806, 809; *Morehead v. Conley* (1991), 75 Ohio App.3d 409, 411-412.

{¶15} RBS asserts that the trial court erred in applying the doctrine of equitable subrogation in favor of Countrywide because equitable subrogation is inapplicable to the facts of this case.

{¶16} Mortgages "take effect in the order of their presentation." R.C. 5301.23(A). Between the RBS mortgage and the Countrywide mortgage, RBS was the first mortgage to be recorded and is first in time. However, Countrywide asserts that the doctrine of equitable subrogation gives its mortgage priority.

{¶17} "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." *Assoc. Financial Servs. Corp. v.*

Miller, 11th Dist. No. 2001-P-0046, 2002-Ohio-1610, 2002 Ohio App. LEXIS 1565, at *8, citing *State v. Jones* (1980), 61 Ohio St.2d 99, 102 (citations omitted).

{¶18} “[E]quity 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*, 61 Ohio St.2d at 102 (citation omitted). “Because equitable subrogation is an equitable doctrine, the equity of the party asserting it ‘must be strong and his case clear.’” *ABN AMRO Mortg. Group, Inc. v. Kangah*, 126 Ohio St.3d 425, 2010-Ohio-3779, at ¶11, citing *Jones*, 61 Ohio St.2d at 102 (citation omitted).

{¶19} In order for equitable subrogation to apply, a lender should have satisfied a prior mortgage or debt, had the intent to hold the first position lien, and the mortgage sought to be subrogated must have failed to end up in the first lien position through mistake. See *Kangah*, 2010-Ohio-3779, at ¶13.

{¶20} Here, the facts indicate that Countrywide satisfied the prior RBS mortgage. Additionally, the documents related to this satisfaction indicate that Countrywide intended to have the first position lien. Countrywide did not achieve the first position because RBS did not sign a release and also did not close the Korbs’ account. The Korbs continued to use this account and amass further debts to RBS after RBS received the payment from Lakeside.

{¶21} RBS argues that although the elements discussed above were met, equitable subrogation is inapplicable because RBS would be subject to a greater burden than it previously had been subject to if the Countrywide mortgage is granted

priority. RBS cites *Kangah*, in which the Ohio Supreme Court found that the party in the second position was in a “worse position that it would have otherwise been,” due to the refinancing and because, through equitable subrogation, the party advancing funds was allowed to have its mortgage placed in first position. *Kangah*, 2010-Ohio-3779, at ¶12. The court found that the new mortgage was a larger mortgage than the original mortgage in the first position. Therefore, the party in the second position would be in a worse position than it was in under the previous mortgage. The *Kangah* court concluded that because the holder of the second mortgage was in a worse position than it would have been had the mortgage not been extinguished, the doctrine of equitable subrogation was inapplicable. *Id.* at ¶15. RBS asserts that the similar facts exist in the present case and the Supreme Court’s holding in *Kangah* should apply.

{¶22} Countrywide asserts that it requested and sought priority only as to \$152,657.74, which is the amount Countrywide paid to satisfy the original MERS mortgage. Countrywide argues because of this, the RBS mortgage would be subordinate to exactly the same amount it had previously been subordinate to prior to Countrywide satisfying the MERS mortgage. Countrywide alleges that it is not seeking priority as to the remaining balance of the Countrywide mortgage. Therefore, RBS would not be in a worse position if the Countrywide mortgage was granted priority under the doctrine of equitable subrogation because it would still be subordinate to a mortgage in the amount of \$152.657.74.

{¶23} Equitable subrogation has been allowed when “[n]o greater burden was placed on the [holder of the secondary mortgage] than she would have borne if the old mortgage *** had not been released.” *Fed. Union Life Ins. Co. v. Deitsch* (1934), 127

Ohio St. 505, 512. Equitable subrogation should not place a burden on the opposing creditor and the creditor should not be placed in a worse position due to a court allowing equitable subrogation. See *Kangah*, 2010-Ohio-3779, at ¶16, *Straman v. Rechtine* (1898), 58 Ohio St. 443, at paragraph one of the syllabus (“the mortgagee has a right to be subrogated to the lien which was paid by the money so by him loaned, when it can be done without placing greater burdens upon the intervening lienholders than they would have borne if the old mortgage had not been released”).

{¶24} While the court in *Kangah* does find that the holder of the mortgage in the second position should not be placed in a worse situation by equitable subrogation, the facts from the present case are distinguishable from those in *Kangah*. The record, including Countrywide’s Supplemental Motion for Summary Judgment, shows that Countrywide is seeking priority only for the amount of the MERS mortgage. Since Countrywide is seeking priority only as to the amount of the MERS mortgage and not for the entire amount of the new Countrywide mortgage, RBS will be in exactly the same position as it would have otherwise been. Therefore, we cannot find that equitable subrogation is improper in this matter based on RBS being placed in a worse position by allowing equitable subrogation.

{¶25} RBS also argues that the doctrine of equitable subrogation is inapplicable to this case because Countrywide was negligent as a matter of law.

{¶26} Countrywide asserts that it was not negligent and that negligence is not dispositive of whether the doctrine of equitable subrogation applies.

{¶27} While it was, at the least, a mistake to fail to obtain a signed release from RBS, we agree with Countrywide that this is not dispositive of whether equitable

subrogation applies. Even assuming that the failure to obtain a release rises to the level of negligence, the doctrine of equitable subrogation still applies under the facts of this case.

{¶28} Where a party did not expect to be in the first loan position but becomes first based on mistake or negligence on behalf of the party seeking application of the doctrine of equitable subrogation, such negligence is “immaterial” and the doctrine of equitable subrogation applies. *Bank One v. Jude*, 10th Dist. Nos. 02AP-1266 and 02AP-1268, 2003-Ohio-3343, at ¶25; *Metro. Bank & Trust Co. v. Roth*, 9th Dist. No. 20322, 2001 Ohio App. LEXIS 1850, at *6-7 (where the lender paid off the first mortgage with the understanding that it would step into the shoes of the holder of the first mortgage, it would be inequitable to allow the lender in the second position to move into the first position).

{¶29} In addition, in cases where the party seeking equitable subrogation is requesting subrogation only in the amount paid to satisfy the mortgage in the first position, courts have held that the doctrine applies as to the amount of the first mortgage. See *Washington Mut. Bank, FA v. Aultman*, 172 Ohio App.3d 584, 2007-Ohio-3706, at ¶42 (where the lender opposing application of equitable subrogation was originally in the second lien position and the other lender sought subrogation only to the extent that it paid off the first mortgage, the equity was strong and the doctrine of equitable subrogation applied); *TCIF REO GCM, LLC v. Natl. City Bank*, 8th Dist. No. 92447, 2009-Ohio-4040, at ¶¶20-21 (court applied equitable subrogation to grant priority to the lender to the extent that it satisfied the first mortgage). “[T]he negligence of the party seeking subrogation does not defeat him so long as the burden of the lienholder

resisting the substitution is not increased.” *Union Trust Co. v. Lessovitz* (1931), 51 Ohio App. 69, 73-74.

{¶30} In this case, RBS is not in a worse position than it was prior to Countrywide’s satisfaction of the MERS mortgage. There is no evidence that RBS suffered any damage at all due to Countrywide’s failure to obtain a release. RBS never bargained for or expected to be in the first loan position. Therefore, even if this court found that Countrywide’s actions in failing to obtain a release were negligent, the application of equitable subrogation would still be proper. As noted previously, Countrywide is only seeking priority as to \$152,657.74, which is the same amount RBS was previously subordinate to under the MERS mortgage. Therefore, the application of the doctrine of equitable subrogation would not place RBS in a worse position than the one it previously occupied.

{¶31} Moreover, denying Countrywide the application of the doctrine of equitable subrogation would result in an unearned windfall for RBS, by placing it in a better position than Countrywide. See *Fed. Home Loan Mtge. Corp. v. Moore*, 10th Dist. No. 90AP-546, 1990 Ohio App. LEXIS 4263, at *7-*8 (a lender who was not “misled or injured” by the negligence of the other party should not advance to the first priority position when such an advance would result in an “unearned windfall”); *Bank One*, 2003-Ohio-3343, at ¶25 (where party did not “bargain for or even expect a first lien position,” to grant that party the first lien position “would create an unearned financial windfall”); *Fed. Natl. Mtge. Assoc. v. Webb*, 5th Dist. No. 2005CA0013, 2006-Ohio-3574, at ¶¶41-43 (court applied the doctrine of equitable subrogation to prevent unjust

enrichment). Applying the doctrine of equitable subrogation in this case prevents RBS from receiving such a windfall.

{¶32} RBS finally argues that if Countrywide's negligence has not been established as a matter of law, this matter should be remanded to the trial court for a determination of negligence.

{¶33} Since we have found that the doctrine of equitable subrogation is applicable regardless of whether Countrywide was negligent, this argument is moot. The trial court need not make such a determination of negligence.

{¶34} We find Countrywide set forth a case for equitable subrogation, and upon these facts, the trial court did not err in granting Countrywide's Motion for Summary Judgment.

{¶35} The sole assignment of error is without merit.

{¶36} For the foregoing reasons, the Judgment Entry of the Geauga County Court of Common Pleas, granting Countrywide's Motion for Summary Judgment, is affirmed. Costs to be taxed against appellant.

MARY JANE TRAPP, J.,

THOMAS R. WRIGHT, J.,

concur.