IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

2977 CAMINO LAS PALMERAS, LLC,
AN ARIZONA LIMITED LIABILITY COMPANY,
Plaintiff/Counterdefendant/Appellant,

v.

DEUTSCHE BANK NATIONAL TRUST COMPANY,
AS INDENTURE TRUSTEE FOR
NEW CENTURY ALTERNATIVE MORTGAGE LOAN TRUST 2006-ALT1,
A NATIONAL TRUST COMPANY,
Defendant/Counterclaimant/Appellee.

DEUTSCHE BANK NATIONAL TRUST COMPANY,
AS INDENTURE TRUSTEE FOR
NEW CENTURY ALTERNATIVE MORTGAGE LOAN TRUST 2006-ALT1,
A NATIONAL TRUST COMPANY,
Third-Party Plaintiff/Appellee,

v.

CHARLES JOHN CROWELL AND CHRISTA KAYE CROWELL,
Third-Party Defendants/Appellants.

No. 2 CA-CV 2018-0141
Filed June 24, 2019

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
NOT FOR PUBLICATION
See Ariz. R. Sup. Ct. 111(c)(1); Ariz. R. Civ. App. P. 28(a)(1), (f).

Appeal from the Superior Court in Cochise County
No. CV201500521
The Honorable Charles A. Irwin, Judge

AFFIRMED

COUNSEL

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By Pernell McGuire and Marshall R. Hunt
Counsel for Appellants

Fidelity National Law Group, Phoenix
By Patrick J. Davis and Nathaniel B. Rose
Counsel for Appellee

MEMORANDUM DECISION

Chief Judge Eckerstrom authored the decision of the Court, in which Presiding Judge Eppich and Judge Espinosa concurred.

E C K E R S T R O M, Chief Judge:

¶1 2977 Camino Las Palmeras, LLC ("CLP") and former spouses Charles J. Crowell and Christa K. Crowell (together "the Crowells") (collectively "Appellants") seek review of the trial court's grant of summary judgment and award of attorney fees in favor of Deutsche Bank National Trust Company ("DB"). For the reasons that follow, we affirm.

Factual and Procedural History

¶2 In 2003, the Crowells purchased a home on Camino Las Palmeras in Sierra Vista (the "Property"). They financed their purchase with a $256,405 loan from National City Mortgage Company ("National City"), secured by a deed of trust on the Property (the "National City DOT") recorded with the Cochise County Recorder's Office in October 2003.

¶3 Two and half years later, the Crowells borrowed $481,500 from New Century Mortgage Corporation, a predecessor of DB, partially to refinance the Property (the "DB Loan"). A portion ($248,917.22) of the DB

Loan was used to repay National City, and a release of the National City DOT was recorded in March 2006. Another portion ($221,018.12) of the DB Loan was disbursed to the Crowells.

¶4 The DB Loan was secured by two deeds of trust on the Property, the first in the amount of $417,000 (the "DB DOT").[1] Although both deeds of trust were dated March 2006, they were not recorded against the Property until September 2007. In the intervening period, other lenders recorded two additional deeds of trust against the Property.

¶5 First, in June 2006, an unrelated third party, J&J and A&A, L.L.C. ("J&J"), sold certain real estate to Ramsey Reserve, LLC, incorporated in May 2006, whose manager was Mr. Crowell and whose mailing address was, at the time, the Property (i.e., the Crowells' home). In connection with this sale, J&J loaned $1,090,000 to Ramsey Reserve and the Crowells individually.[2] This loan was secured by the Property and other parcels of real estate, as reflected in the deed of trust J&J recorded in July 2006 and again in January 2007 (the "J&J DOT"). The J&J DOT established that, once the borrowers reduced the principal by $190,000, J&J would release the Property and certain other parcels.

¶6 Then, in December 2006, another unrelated third party, Southwest Desert Images, LLC ("Southwest"), recorded a deed of trust (the "Southwest DOT") to secure a $270,000 seller carryback loan to the Crowells. The Crowells added the Property and other parcels of real estate as collateral to secure this debt as well. The Southwest DOT established that, once the Crowells reduced the principal by $50,000, Southwest would release the Property.

¶7 In May 2008, the Crowells stopped making payments to DB, defaulting under the DB DOT. In April 2009, the Crowells filed a

[1]The second deed of trust was in the amount of $64,500.

[2]Although the version of the J&J DOT executed and recorded in July 2006 listed only Ramsey Reserve as trustor, the version that was re-recorded in January 2007 specifies that the document was being re-recorded to "correct the trustor," namely by adding the Crowells as trustors with regard to the Property (i.e., "Parcel XII"). To the extent Appellants have implied elsewhere that the J&J loan was not to the Crowells directly, we further note that the Schedule D the Crowells filed in their bankruptcy proceedings listed J&J as one of their personal creditors, with a deed of trust on the Property.

Chapter 11 bankruptcy petition. The Crowells listed Southwest as an unsecured creditor, and they did not identify Southwest as having any interest in or lien against the Property when filing their original schedules, statements, and plans with the bankruptcy court.

¶8 In January 2010, DB filed an adversary proceeding in the Chapter 11 case against J&J and the Crowells to determine the priority of the DB DOT and J&J DOT. In that proceeding, DB sought a declaration of its right to pay $190,000 to effect a release of the Property from the J&J DOT. In March 2010, the bankruptcy court confirmed the Crowells' second amended Chapter 11 plan, in which the Crowells agreed to pay whichever party succeeded in the adversary proceeding between DB and J&J.[3] The only secured claims relating to the Property addressed in the Crowells' amended Chapter 11 plan were those of DB and J&J; the plan still did not identify Southwest as having any interest in or lien against the Property and did not provide for any payments to Southwest as a lienholder on the Property.

¶9 DB and J&J ultimately reached an agreement to resolve the adversary proceeding. DB agreed to have its title insurer pay J&J $240,000 in exchange for the release of the Property from the J&J DOT.[4] In return, J&J agreed that DB would receive all the Crowells' payments under their amended Chapter 11 plan in connection with the Property. J&J recorded the release of the Property from the J&J DOT in July 2010.

¶10 Despite their prior agreement to do so, the Crowells refused to stipulate that the money deposited with the bankruptcy court be released to DB and refused to pay any amounts to DB. As a result, DB filed a motion to enforce the Crowells' amended Chapter 11 plan to enforce its rights as the successful party in the adversary proceeding against J&J and senior lienholder on the Property.

¶11 Before the bankruptcy court ruled on DB's motion, the Crowells filed an amended Schedule D, disclosing for the first time that

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[3] In particular, the Crowells agreed to pay the successful party $375,000 with interest at 5.5 percent per annum over thirty years, with a balloon payment of all principal and interest due in six years, as well as any cash attributable to the rental of the Property.

[4] Only the Property was released from the J&J DOT as a result of this agreement; the J&J DOT continued as a valid lien against the other property identified therein.

they had also given Southwest a security interest against the Property, which they valued at $420,000. The Crowells apparently did not move to further amend their Chapter 11 plan to either modify DB's entitlement to payments related to the Property or provide for payments to Southwest.

¶12 In December 2011, the bankruptcy court granted DB's motion to enforce the Crowells' amended Chapter 11 plan, ordering: (a) that all payments already deposited by the Crowells be released to DB; and (b) that the Crowells submit all future payments relating to the Property due under their Chapter 11 plan to DB, beginning with the monthly payment due in January 2012.

¶13 In late February 2012, Mr. Crowell formed CLP,[5] an Arizona limited liability real estate company. Mr. Crowell was the organizer, statutory agent, and sole member of CLP, to which he made a capital contribution of $50,000.[6] One week later, CLP (whose agent, manager, and sole member was still Mr. Crowell) executed an agreement with Southwest in which CLP agreed to purchase Southwest's rights under the Southwest DOT for $10,000—plus a promise to pay an additional $40,000 from the sale of the Property—in an attempt to become the first-priority lienholder of record. In April 2012, Southwest recorded the assignment of the Southwest DOT to CLP.

¶14 In August 2012, given the Crowells' failure to comply with their Chapter 11 plan and the court's December 2011 order that they do so, and upon discovering Mr. Crowell's formation of CLP and its acquisition of the Southwest DOT, DB filed an adversary proceeding in the bankruptcy action against the Crowells and CLP, asking the court to declare DB in first position on the Property under multiple theories, including equitable subrogation. However, in November 2012, before resolving the issues raised by DB, the bankruptcy court dismissed the Crowells' bankruptcy as a result of their failure to comply with their Chapter 11 plan as ordered. Later that month, J&J executed and recorded a document purporting to:

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[5] As indicated at the beginning of this decision, "CLP" is an abbreviation for "2977 Camino Las Palmeras, LLC," which is essentially the address of the Property at issue in this case.

[6] At the time of its formation, Ms. Crowell disclaimed any community property interest in CLP, and Appellants have insisted that she has never been a member or had any interest in CLP.

(a) rescind and vacate its partial release of the Property from the J&J DOT; and (b) assign J&J's beneficial interest under the J&J DOT to DB.

¶15 Over two and a half years later, in July 2015, DB attempted to foreclose on the Property, noticing a trustee's sale under the J&J DOT for October 2015. In October 2015, before the trustee's sale occurred, CLP initiated this action against DB and others, asking the court to: (a) determine the rights of the parties with respect to the Property; (b) award damages to CLP for DB's alleged violations of A.R.S. § 33-420;[7] and (c) issue a temporary injunction barring the trustee's sale. That same day, the court granted a temporary restraining order without notice, enjoining DB's attempted trustee's sale.

¶16 In May 2016, together with its answer, DB filed a counterclaim against CLP and a third-party complaint against the Crowells seeking to quiet title to the Property and asking the trial court to declare that DB held a first-position lien through equitable subrogation.[8]

¶17 The parties cross-moved for summary judgment. After a hearing, the trial court granted DB's motion. In July 2018, the court entered a final judgment which: (a) declared that the DB DOT is a first-position lien against the Property in the amount of $686,131.82 [9] plus additional

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[7]In particular, CLP alleged DB had knowingly recorded multiple documents that were "groundless," contained "a material misstatement or false claim," or were "otherwise invalid," namely: (a) the rescission of the release of the Property from the J&J DOT and the assignment of J&J's interest under the J&J DOT to DB in November 2012; and (b) the notice of trustee's sale and related documents in July 2015.

[8]In the alternative, DB asked the court to declare either: (a) that the release of the Property from the J&J DOT be reformed and treated as an assignment of beneficial interest under the J&J DOT to DB as of the date it was recorded; or (b) that the beneficial interest under the Southwest DOT merged with the Crowells' ownership interest, thereby extinguishing the Southwest DOT.

[9]This figure includes: (i) the $248,917.22 DB paid to release the Property from the National City DOT in March 2006; (ii) interest on that amount at the rate of the National City debt (5.875%, or $39.91/day) from the date of the Crowells' default under the DB DOT (May 1, 2008) until October 20, 2017 (the day DB supplemented its motion for summary judgment to request such interest), equaling $138,088.60; (iii) the $240,000 DB caused to be paid to release the Property from the J&J DOT in July 2010;

interest,[10] with priority over any interest in the Property in that amount held by Appellants; (b) vacated the October 2015 order enjoining DB from completing a trustee's sale of the Property; (c) declared that DB may non-judicially foreclose the DB DOT against the Property in the amount of the first-position lien; (d) found that DB did not violate A.R.S. § 33-420 as alleged in CLP's complaint; (e) denied Appellants' cross-motion for summary judgment; and (f) awarded $6,682.46 in costs to DB pursuant to A.R.S. §§ 12-341 and 12-1840.

¶18 Appellants timely filed this appeal. We have jurisdiction pursuant to A.R.S. §§ 12-120.21(A)(1) and 12-2101(A)(1).

Discussion

¶19 On appeal from summary judgment, we must determine whether any material factual dispute exists and, if not, whether the trial court correctly applied the law. *Cliff Findlay Auto., LLC v. Olson*, 228 Ariz. 115, ¶ 8 (App. 2011). We view the evidence and reasonable inferences in the light most favorable to the party or parties against whom summary judgment was granted, here Appellants. *Andrews v. Blake*, 205 Ariz. 236, ¶ 12 (2003). We review *de novo* whether the trial court correctly applied the law, including "whether equitable relief [was] available and appropriate." *Id.*

A. Equitable Subrogation

¶20 Appellants contend the trial court erred in granting summary judgment in DB's favor because it improperly applied the doctrine of equitable subrogation to find DB in possession of a first-position lien on the Property. DB counters that the trial court correctly found DB was equitably subrogated to both the National City DOT and the J&J DOT. Whether the trial court properly applied equitable subrogation "involves a question of law, which we review de novo," *Cont'l Lighting & Contracting, Inc. v. Premier Grading & Utils., LLC*, 227 Ariz. 382, ¶ 8 (App. 2011), but it also "hinge[s] on

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and (iv) $59,076 in attorney fees, which the court concluded could only be added to DB's lien against the Property, not recovered from the Crowells personally. The parties have not addressed the $50 discrepancy between these amounts and the amount of the judgment.

[10]In particular, the court included any additional interest accrued on the National City payoff after October 20, 2017 (i.e., "$39.91/day from 10/20/17 to the date of foreclosure").

the unique facts of each case," *Weitz Co. LLC v. Heth*, 235 Ariz. 405, ¶ 26 (2014).

¶21 "Previously recorded deeds of trust normally take priority over later deeds of trust." *US Bank, N.A. v. JPMorgan Chase Bank, N.A.*, 242 Ariz. 502, ¶ 8 (App. 2017). Subrogation is one of multiple equitable remedies that "may permit a later-recorded deed of trust to assume priority over an earlier deed of trust." *Id.* It is "the substitution of another person in the place of a creditor, so that the person in whose favor it is exercised succeeds to the rights of the creditor in relation to the debt." *Sourcecorp, Inc. v. Norcutt*, 229 Ariz. 270, ¶ 5 (2012) (quoting *Mosher v. Conway*, 45 Ariz. 463, 468 (1935)); *see also Weitz*, 235 Ariz. 405, ¶ 15 ("When equitable subrogation occurs, the superior lien and attendant obligation are not discharged but are instead assigned by operation of law to the one who paid the obligation."). "[A]n equitably subrogated lien 'attaches' when the superior lien was recorded[.]" *Weitz*, 235 Ariz. 405, ¶ 15.

¶22 Our supreme court has expressly adopted the expansive approach to equitable subrogation laid out in the Restatement (Third) of Property (Mortgages) § 7.6 (1997). *Sourcecorp*, 229 Ariz. 270, ¶¶ 8–12. In so doing, the court explained that the Restatement's approach "is most consistent with the rationale for equitable subrogation": "prevent[ing] injustice" by "avoid[ing] a person's receiving an unearned windfall at the expense of another." *Id.* ¶¶ 5, 12 (citing *Mosher*, 45 Ariz. at 468, and quoting Restatement § 7.6 cmt. a).

¶23 As articulated in the Restatement:[11]

> One who fully performs an obligation of another, secured by a [deed of trust ("DOT")], becomes by subrogation the owner of the obligation and the [DOT] to the extent necessary to prevent unjust enrichment. Even though the performance would otherwise discharge the obligation and the [DOT] they are preserved

[11]The Restatement uses the term "mortgage," but we have altered the text to highlight parallels with the present case, which involves the respective priorities of competing deeds of trust. *See Weitz*, 235 Ariz. 405, n.2 (explaining court's interchangeable use of terms "mortgage," "deed of trust," and "lien").

> and the [DOT] retains its priority in the hands of the subrogee.

Restatement § 7.6(a). This result may be available when the party seeking subrogation performed the debtor's obligation to the superior lienholder either: (a) upon the debtor's request for such performance, "if the person performing was promised repayment and reasonably expected to receive a security interest in the real estate with the priority of the mortgage being discharged," § 7.6(b)(4); or (b) "in order to protect his or her interest," § 7.6(b)(1).[12]

¶24 When DB[13] repaid the Crowells' debt to National City in March 2006—thereby releasing the Property from the National City DOT—this must have been at the request of the Crowells. Appellants have not suggested that DB would have loaned money to the Crowells absent a promise to repay it, and DB reasonably expected to receive a security interest in the Property with the priority of the National City DOT it was discharging.[14] Then, when DB acted to release the Property from the J&J DOT in July 2010, it did so to protect its own interest in the Property, because the bankruptcy court might otherwise have treated that interest as subordinate to one or more intervening liens due to DB's delay in recording the DB DOT. DB therefore contends, and the trial court agreed, that DB "is subrogated to the rights and limitations of the person paid" (i.e., National City and J&J)—or "bec[ame] by subrogation the owner of the obligation[s] and the [DOTs]"—putting the DB DOT in first position vis-à-vis the Property, at least in the amount expended to perform the Crowells' obligations to National City and J&J. *Sourcecorp*, 229 Ariz. 270, ¶ 5 (quoting *Mosher*, 45 Ariz. at 472, and then Restatement § 7.6(a)).

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[12] Subrogation may also be appropriate if the party seeking it performed the debtor's obligation "under a legal duty to do so" or "on account of misrepresentation, mistake, duress, undue influence, deceit, or other similar imposition." Restatement § 7.6(b)(2-3).

[13] Although it was New Century Mortgage Corporation that repaid the Crowells' debt to National City, New Century was a predecessor of DB, and we refer to "DB" here to avoid confusion.

[14] In the alternative, DB paid off the National City DOT to protect its concurrently acquired interest in the Property, which would also have been sufficient to make subrogation available. *See Sourcecorp*, 229 Ariz. 270, ¶ 17.

¶25 Appellants contend the trial court erred in granting summary judgment in favor of DB because the doctrine of equitable subrogation cannot be applied where doing so would prejudice intervening interests or good-faith purchasers. We agree that subrogation is not appropriate when it will "materially prejudice the holders of intervening interests." *Id.* ¶ 25 (quoting Restatement § 7.6 cmt. e). However, considering as we must the particular facts and circumstances of this case, *see id.* ¶ 7, we find no possibility for prejudice.

¶26 Appellants insist, in particular, that permitting subrogation in this case "would unduly prejudice the Southwest DOT, now held by CLP." This argument fails. Regardless of whether Southwest acquired its interest in the Property in good faith in December 2006,[15] CLP acquired that interest with actual knowledge of all of the transactions at issue.[16] This included: (a) all the recorded liens against the Property (each of which had been signed by one or both of the Crowells); (b) DB's payments to release the Property from the National City DOT and the J&J DOT; and (c) DB's efforts in the Crowells' bankruptcy proceeding to solidify its priority position, which had culminated in an agreement with J&J and an order from the bankruptcy court that the Crowells should pay DB as first-position lienholder on the Property.

¶27 Appellants have not contended—nor could they credibly do so—that the Crowells could have avoided their obligations to DB by

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[15]Even if it did, the Southwest DOT was always subordinate to both the National City DOT and the J&J DOT. The animating rationale of the doctrine of equitable subrogation is that "an intervening lienholder generally will not be prejudiced by maintaining the same position it occupied before the later deed of trust was [recorded]." *Markham Contracting Co., Inc. v. Fed. Deposit. Ins. Co.*, 240 Ariz. 360, ¶ 15 (App. 2016) (citing Restatement § 7.6 cmts. a, e). There is no dispute that the J&J DOT had already been recorded by the time of Southwest's loan to the Crowells in December 2006. If Southwest was not also aware at that point that DB had paid off the National City DOT in March 2006, that was not only because DB had failed to record its DOT, but also because the Crowells did not disclose that fact to Southwest despite having actual knowledge of it.

[16]At the time of CLP's agreement with Southwest in March 2012—a few days after its formation—there was no material distinction between CLP and Mr. Crowell, who was CLP's organizer, statutory agent, manager, sole member, and the person who signed the agreement with Southwest.

purchasing Southwest's interest in the Property. *See 3502 Lending, LLC v. CTC Real Estate Serv.*, 224 Ariz. 274, ¶ 14 (App. 2010) ("[E]ven an unrecorded instrument is fully enforceable between the parties to the transaction."). Equity bars Mr. Crowell from achieving the same result by having formed CLP and signed the agreement to acquire the Southwest DOT.

¶28 We are unable to credit Appellants' argument that CLP had a "belief from the appearance of public records that it was obtaining the first position lien on the Property." Any such belief could not have been genuine. For this reason, CLP was not a qualifying "good-faith purchaser" who must be protected from subrogation for purposes of equity. *See* Restatement § 7.6 cmt. f (Purchasers of junior liens who "believe, from the appearance of public records, that [they are] acquiring a first lien on the property . . . should be protected against subrogation *unless they had actual knowledge that the payor's advances were used to pay the first mortgage*." (Emphasis added.)).[17]

¶29 We also reject Appellants' argument that "CLP was justified in relying on [DB's] failure to assert its rights" when it purchased the Southwest DOT in March 2012. As explained above, CLP had actual knowledge that DB had been actively involved in the Crowells' bankruptcy proceedings. The Crowells knew DB had asserted its rights since as early as its filing of the initial adversary proceeding against J&J and the Crowells in January 2010. DB had then moved for confirmation of the Crowells' amended Chapter 11 plan in October 2011 (in which the Crowells themselves had agreed to treat the prevailing party in the adversary proceeding as the superior lienholder), resulting in the December 2011 court order requiring the Crowells to treat DB as first-position lienholder on the Property. Then, when Mr. Crowell formed CLP and purchased the Southwest DOT shortly afterwards, he could not plausibly have believed that DB had declined to assert its rights as a creditor.

[17] Appellants argue their actual knowledge at the time of CLP's transaction with Southwest should not matter because they "have stepped into the shoes of Southwest" and Southwest had no such actual knowledge when it obtained its lien on the Property in December 2006. Appellants have cited no authority to support this assertion, and we find none. Nor is there any sensible policy reason to allow parties to avoid the consequences of their own actual knowledge by intentionally obtaining the interests of good-faith purchasers who had no such knowledge when obtaining their interests.

¶30 Nor was it inequitable for DB to acquire National City's and J&J's priority positions over Southwest (now held by CLP), as if those prior lienholders had expressly assigned their superior liens to DB. *See Weitz*, 235 Ariz. 405, ¶ 15 ("The subrogee is in the same position as if the superior lienholder had expressly assigned the superior lien to the subrogee."). To the contrary, it would be inequitable *not* to subrogate DB to the National City and J&J DOTs. Without subrogation, those two superior DOTs would be treated as fully discharged with regard to the Property, advancing CLP to a first-position lien. This would unjustly enrich the Crowells personally and put CLP's interest before the DB DOT, which secured a loan that was used not only to pay off the $248,917.22 remainder of the National City loan, but also to provide a simultaneous $221,018.12 disbursement to the Crowells. It would also advance CLP's priority thanks to the $240,000 payment that was made to release the Property from the J&J DOT—another entirely "unearned windfall at the expense of another." Restatement § 7.6 cmt. a.

¶31 The purpose of equitable subrogation is to avoid such unjust enrichment. *See Sourcecorp*, 229 Ariz. 270, ¶ 5. Here, however, the risk of unjust personal enrichment to the debtors exceeds the more banal injustice contemplated in the Restatement and related jurisprudence, which focus on "prevent[ing] intervening lienholders from receiving an unearned promotion in priority at the successor lender's expense." *Markham Contracting Co. v. Fed. Deposit Ins. Co.*, 240 Ariz. 360, ¶ 19 (App. 2016); *see also Weitz*, 235 Ariz. 405, ¶ 25 (windfall normally addressed by equitable subrogation is inequity of "advancing a lienholder's lien priority after a third party pays off a superior obligation").[18] In particular, Mr. Crowell formed CLP, which paid $10,000 to purchase the Southwest DOT after the Crowells had already been in default on the DB DOT for years and had recently been ordered by the bankruptcy court to pay DB. In examining the "totality of the equities," this is not a close case. *Markham*, 240 Ariz. 360,

[18] As *Markham* explains, lienholders who acquire an interest in a given property subject to an earlier-priority loan accept the risk that the property owner will not pay that loan, such that the intervening lien will be defeated. 240 Ariz. 360, ¶ 19. Allowing the intervening lienholder to advance in priority "merely because the earlier-priority loan has been refinanced would be to give the lienholder an undeserved windfall. In such circumstances, subrogation will typically leave the lienholder 'no worse off than before the senior obligation was discharged,' because the lienholder's 'position is not materially prejudiced, but is simply unchanged.'" *Id.* (citation omitted) (quoting Restatement § 7.6 cmts. a, e).

¶ 18. We affirm the trial court's application of equitable subrogation in favor of DB.

¶32 Regarding the J&J DOT, Appellants make two additional arguments against equitable subrogation in favor of DB. First, they contend that DB did not pay to release the Property from the J&J DOT, which was effectuated through a $240,000 payment made to J&J by DB's title insurance company, Ticor Title. On this basis, Appellants insist that, if any party is entitled to subrogation, it is DB's insurer, not DB itself, which did not expend the funds used to discharge the Crowells' obligation to J&J in order to release the Property and would receive an inequitable and unearned windfall if subrogated to J&J's interest.

¶33 Although Appellants are correct that the Restatement and the case law indicate that insurers may in some instances benefit from equitable subrogation when they (as opposed to their insureds) discharge superior loans, we decline to reach such a result here. DB's agreement with J&J expressly established that "[DB], through its title insurer Ticor Title Insurance Company . . . , shall pay $240,000.00 to J&J." The record does not support Appellants' contention that Ticor Title made the payment to J&J as a result of DB having "made a claim on its title insurance policy"; Appellants conceded below that they were making assumptions about why Ticor Title issued the payment to J&J. It is unclear from the record why DB knew in July 2010 that it could agree to terms requiring Ticor Title to pay $240,000 to J&J. But, as DB argued to the trial court, the Restatement cautions that "a direct payment from the subrogee to the prior mortgagee" is not required; subrogation may be available when the new lender (e.g., DB) "pay[s] a title company . . . with instructions to pay the prior lender."

¶34 Having been presented with these arguments, and having heard directly from the parties at a hearing on their motions for summary judgment, the trial court expressly found that "the payment made by TICOR Title Company in the amount of $240,000 on behalf of [DB] was in fact payment by [DB] to J&J."[19] Where, as here, Appellants have chosen not to furnish this court with transcripts from the underlying proceeding, "we assume the missing portions of the record would support the trial court's findings and conclusions." *State ex rel. Dep't of Econ. Sec. v. Burton*, 205 Ariz. 27, ¶ 16 (App. 2003); *see also* Ariz. R. Civ. App. P. 11(c)(1)(B) ("If the appellant will contend on appeal that a judgment, finding or conclusion, is

[19]Although Appellants argue that DB "did not pay to release the J&J DOT," they simultaneously argue that DB "paid J&J settlement funds."

unsupported by the evidence or is contrary to the evidence," it is appellant's duty to order and "include in the record transcripts of all proceedings containing evidence relevant to that judgment, finding or conclusion.").[20]

¶35 Appellants' second argument against subrogating DB to J&J's interest in the Property is that DB did not intend to be subrogated to J&J's lien position. In particular, Appellants contend that DB never recognized the validity of J&J's interest in the Property,[21] arranged for the $240,000 payoff only to "avoid the uncertainty and expense of litigation," and is judicially estopped from "claim[ing] the benefit of subrogation to a lien it previously claimed was invalid."[22] In support of this argument, Appellants cite primarily to comment e of the Restatement. But—as its title reflects—

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[20]We also note that, in expressly adopting the Restatement's "more expansive" standard for equitable subrogation, *Sourcecorp*, 229 Ariz. 270, ¶¶ 10–12, our supreme court has acknowledged "'the modern tendency' to extend the doctrine's use" rather than restrict it, *id.* ¶ 7 (quoting *Mosher*, 45 Ariz. at 468).

[21]Appellants contend that, in its agreement with J&J, DB disputed whether the release provision in the J&J DOT remained effective. This is not correct. Rather, the agreement stated that *the parties* (i.e., DB and J&J) disputed whether the provision remained effective and that, in the adversary proceeding being settled, DB had sought "a declaration of its right to pay $190,000 to effect a release" of the Property from the J&J DOT "per the Release Provision"—indicating that it was DB who believed that the provision still remained in effect, which J&J apparently disputed.

[22]Appellants also point to the amount of the J&J payoff as evidence of DB's purported lack of intent to be subrogated: "If [DB] wished to be subrogated to J&J's interest, it would only need to pay the $190,000.00 amount required under the Release Provision" in the J&J DOT, "[b]ut [DB]'s title insurer paid $240,000.00, not to pay to satisfy J&J's interest in the [P]roperty, but rather to fully settle the dispute with J&J." This argument fails to account for the fact that the release provision in the J&J DOT required "a principal reduction payment of $190,000," which would include not only the $190,000 referenced by Appellants (minus any payments that had already been made toward the principal), but also any unpaid interest that had accrued from the date of the loan (June 2006) until the date of the release payment to J&J (July 2010). That the $240,000 payment included the interest the Crowells owed to J&J at the time of the payoff also explains why DB did not ask the trial court for any additional interest accrued on the J&J DOT, as they did regarding the National City DOT.

that portion of the Restatement relates to instances involving a payor's "[p]erformance at the request of the debtor." Restatement § 7.6 cmt. e. This transaction occurred instead between two creditors. Nothing in the relevant portions of the Restatement or Arizona case law requires a party seeking subrogation to prove that the performing party intended to be subrogated when performing the debtor's obligation to the superior lienholder in order to protect its own interest. Regardless of whether DB agreed that J&J's interest in the Property was superior to its own, there is no doubt that DB initiated the adversary proceeding against J&J and then settled with J&J in order to protect its interest in the Property. *See id.* at § 7.6(b)(1) and cmt. b. And, as our supreme court has explained, subrogation is available "to prevent unjust enrichment" when one party satisfies a debtor's obligation to a superior lienholder in order to protect an interest in the property, "irrespective of an express or implied agreement that the party will succeed to the position of the prior lienholder." *Sourcecorp*, 229 Ariz. 270, ¶ 21.

¶36 To deny equitable subrogation in this case would unjustly enrich Appellants at DB's expense. And, given the "unique facts of [this] case," *Weitz*, 235 Ariz. 405, ¶ 26, it would also reward Appellants for arguably unscrupulous conduct, a result contrary to the principles of equity. For all these reasons, we conclude that the trial court correctly applied equitable subrogation in favor of DB and granted summary judgment on that basis.[23]

B. Laches

¶37 In granting summary judgment in favor of DB, the trial court rejected Appellants' argument that DB's equitable subrogation claims were barred by laches. Appellants challenge this determination on appeal, insisting that DB exhibited "unreasonable delay" in asserting its rights, "caus[ing] CLP to expend considerable sums" to acquire the Southwest DOT "in reliance on the then-current status of the title of the Property." When reviewing a ruling on summary judgment, we review *de novo* the trial court's determination that equitable subrogation was not barred by laches. *See Loiselle v. Cosas Mgmt. Grp., LLC*, 224 Ariz. 207, ¶ 8 (App. 2010) (*de novo* review for availability of equitable defenses in summary judgment context).

¶38 Laches is an equitable defense. It renders a claim in equity unenforceable "where, under the totality of circumstances, the claim, by

[23]We therefore necessarily reject Appellants' argument that we must declare CLP in first position on the Property.

reason of delay in prosecution, would produce an unjust result." *Harris v. Purcell*, 193 Ariz. 409, 410 n.2 (1998). Importantly, "[e]quity does not encourage laches, and the doctrine may not be invoked to defeat justice but only to prevent injustice." *Beltran v. Razo*, 163 Ariz. 505, 507 (App. 1990).

¶39 Laches may bar a claim when: (a) the party bringing the claim delayed unreasonably in doing so; and (b) that delay "resulted in prejudice to the other party sufficient to justify denial of relief." *McComb v. Superior Court*, 189 Ariz. 518, 525 (App. 1997) (quoting *Mathieu v. Mahoney*, 174 Ariz. 456, 459 (1993)). In this case, the trial court focused on the second criterion, finding that laches did not apply because DB's delay in claiming equitable subrogation did not result in prejudice.

¶40 We agree that Appellants have failed to establish prejudice. *See Rash v. Town of Mammoth*, 233 Ariz. 577, ¶ 18 (App. 2013) (parties asserting laches defense bear burden of establishing both unreasonableness of delay and resulting prejudice). As discussed above, CLP chose to acquire the Southwest DOT with full knowledge of DB's loan to the Crowells, DB's discharge of the National City and J&J DOTs, and DB's successful efforts before the bankruptcy court to be treated as first-priority lienholder on the Property. Any harm to Appellants stemming from that choice cannot be attributed to DB. And, because prejudice "must be shown" in order to bar a claim on the basis of laches, *McComb*, 189 Ariz. at 525 (quoting *Mathieu*, 174 Ariz. at 459), we need not determine whether DB exhibited unreasonable delay in formally asserting its equitable subrogation claims. *See also Sotomayor v. Burns*, 199 Ariz. 81, ¶ 8 (2000) (laches defense "cannot stand on unreasonable conduct alone" because "showing of prejudice is also required"). We therefore affirm the trial court's ruling that DB's claims are not barred by laches.[24]

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[24]Appellants argue that, even if DB's claims are not barred by laches, they are nonetheless time barred under either: (a) the one-year statute of limitations for actions created by statute established at A.R.S. § 12-541(5); or (b) the catch-all four-year statute of limitations established at A.R.S. § 12-550. However, Appellants waived such a defense by failing to raise it in response to DB's counterclaim (in the case of CLP) and third-party complaint (in the case of the Crowells). *See Uyleman v. D.S. Rentco*, 194 Ariz. 300, ¶ 10 (1999) ("The statute of limitations is an affirmative defense that is waived unless raised."). Appellants had ample time to seek leave from the trial court to amend their respective answers to include a statute of limitations defense. *See Romo v. Reyes*, 26 Ariz. App. 374, 376 (1976) ("An answer may be amended at any time before trial," and court erred in

C. Attorney Fees

¶41 After the trial court granted summary judgment in its favor, DB applied for attorney fees. In particular, DB argued it was the prevailing party in an action arising out of contracts providing for the award of fees: the DB DOT and the promissory note it secured. The court initially granted DB's award in the amount of $59,076 against the Crowells personally, but it then revised the award, finding that although DB was entitled to recover its fees under the DB DOT, "such fees may only be added to the lien [DB] has against the . . . [P]roperty," not awarded in a personal judgment against the Crowells.

¶42 Appellants contend it was error for the trial court to award fees to DB because the DB DOT does not authorize a fee award.[25] This argument fails because the court corrected its judgment to ensure full fidelity to the terms of the DB DOT by incorporating the attorney fees into DB's total first-position lien interest on the Property.

¶43 Paragraph 9 of the DB DOT establishes that—if the Crowells defaulted on their agreement (which they did) or there arose "a legal proceeding that might significantly affect [DB's] interest in the Property and/or rights under [the DB DOT]," including a proceeding in bankruptcy (which did occur)—DB was entitled to protect its interest in the Property and rights under the DB DOT, including by expending reasonable attorney fees. Paragraph 9 then establishes that "[a]ny amounts" disbursed by DB in this way "shall become additional debt of Borrower [i.e., the Crowells] secured by [the DB DOT]," accruing interest at the same rate as the rest of the debt secured by the instrument. This language expressly contemplates what the court did here: adding attorney fees to the equitably subrogated amount DB is owed under the DB DOT.

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denying plaintiff's motion to amend answer). They never did so, which explains why the court did not address the issue after Appellants raised it for the first time in their response to DB's motion for summary judgment. Because Appellants waived the statute of limitations defense and the trial court did not address it, we likewise need not address it on appeal. *See Salt River Project/Bechtel Corp. v. Indus. Comm'n of Ariz.*, 179 Ariz. 280, 282 (App. 1994).

[25]Appellants also argue that A.R.S. § 12-341.01 does not support a fee award, but—as Appellants concede—the court did not award DB fees under the statute and the issue is not before us.

D. CLP's Claims Under A.R.S. § 33-420

¶44 In addition to granting summary judgment to DB on its claim for equitable subrogation, the trial court ruled that DB "did not violate A.R.S. § 33-420" as alleged by CLP, entering judgment in favor of DB and against CLP accordingly. Appellants contest this ruling, urging us to order the trial court to "enter judgment in CLP's favor declaring the J&J DOT is released and [DB's] efforts to foreclose that DOT are unlawful."[26] We review *de novo* whether the court correctly entered judgment against CLP on its § 33-420 claims. *Andrews*, 205 Ariz. 236, ¶ 12.

¶45 Where a party claiming an interest in or lien against real property knowingly records a document that is "groundless, contains a material misstatement or false claim or is otherwise invalid," § 33-420 makes that party liable to "the owner or beneficial title holder" of the real property in question. As explained above, CLP[27] asked the trial court to find that DB violated the statute by recording: (a) in November 2012, the rescission of the release of the Property from the J&J DOT and assignment of J&J's interest under the J&J DOT to DB; and (b) in July 2015, the notice of trustee's sale and related documents. Appellants argue that the filing of these documents violated § 33-420 because the J&J DOT was released in July 2010 and remained released and unenforceable thereafter, having had the conclusive effect of revesting in the Crowells all title to the Property that had been encumbered by the J&J DOT. Thus, they argue, DB's efforts to "rescind" the release, assign the J&J DOT to itself, and foreclose the J&J DOT were void *ab initio* or otherwise invalid.

¶46 This argument fails because it assumes no equitable subrogation was available to prevent such an unjust result. But we have found, as the trial court did below, that DB was subrogated to the J&J DOT in the amount of the $240,000 it caused to be paid to release the Property. As explained above, "[w]hen equitable subrogation occurs, the superior lien and attendant obligation are not discharged but are instead assigned

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[26]In particular, Appellants ask that we order the trial court to "grant summary judgment to CLP: (a) declaring the J&J DOT released and unenforceable; (b) awarding CLP statutory damages under A.R.S. § 33-420; and (c) declaring CLP to be the first position lien holder on the Property."

[27]As the current beneficiary under the Southwest DOT, CLP is a "beneficial title holder" of the Property with standing to challenge DB's alleged wrongful filings under § 33-420. *See Hatch Cos. Contracting, Inc. v. Ariz. Bank*, 170 Ariz. 553, 555-56 (App. 1991).

by operation of law to the one who paid the obligation." *Weitz*, 235 Ariz. 405, ¶ 15. DB is therefore "in the same position as if [J&J] had expressly assigned the superior lien to [DB]," as if the $240,000 payment to J&J had not been made. *Id.* Appellants are therefore incorrect when they characterize the July 2010 release filed by J&J as fully extinguishing any beneficial interest in the Property—or the Crowells' corresponding obligations—under the J&J DOT.[28]

¶47 Appellants insist that, under A.R.S. § 33-707, a release like the one recorded by J&J in July 2010 is "conclusive evidence" that the J&J DOT's encumbrance on the Property was satisfied and released. But, as the statute makes plain, this is only true with regard to "purchasers and encumbrancers for value *and without actual notice*." § 33-707(A) (emphasis added). As discussed at length above, CLP does not qualify, having acquired the Southwest DOT with actual notice that DB had caused the release of the Property from the J&J DOT with the expectation that DB would be paid in conformity with the Crowells' own Chapter 11 plan as first-priority lienholder on the Property.

¶48 Having performed the Crowells' obligation to J&J with regard to the Property, DB was entitled to receive and record a written assignment of the rights it had acquired through subrogation, which was "helpful in ensuring that others recognize [DB's] rights." Restatement § 7.6 cmt. a. DB did so in November 2012. Then, after the Crowells failed to repay their loans as agreed and ordered in bankruptcy, DB was entitled to begin foreclosure proceedings. It did so in July 2015. For these reasons, DB's filing of the challenged documents did not violate § 33-420, and the trial court correctly entered judgment in favor of DB and against CLP on these claims.

Disposition

¶49 For the foregoing reasons, DB was entitled to judgment as a matter of law, and the trial court properly granted summary judgment in DB's favor. We therefore affirm the court's amended final judgment in its

[28]We note that Appellants do not contend that the release of the National City DOT recorded in March 2006 fully extinguished DB's rights or the Crowells' obligations thereunder.

entirety.[29] As they have not prevailed in this action, we reject Appellants' request for their attorney fees on appeal.

[29] Because we affirm the trial court's order granting summary judgment on the bases discussed above, leaving CLP with a lien position that is junior to DB's subrogated interests in the Property, we agree it was not necessary for the trial court to rule on—and we need not address the parties' arguments regarding—DB's request for an order under A.R.S. § 33-816 barring the foreclosure of the Southwest DOT.