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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-001023-MR

INDYMAC BANK, FSB — APPELLANT

v.

APPEAL FROM WARREN CIRCUIT COURT
HONORABLE STEVE ALAN WILSON, JUDGE
ACTION NO. 07-CI-01622

E*TRADE BANK,
KAREN JOHNSON AND
JOHN JOHNSON — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: DIXON, MAZE AND NICKELL, JUDGES.

MAZE, JUDGE: Appellant, IndyMac Bank (hereinafter "IndyMac"), appeals the judgment of the Warren Circuit Court on cross-motions for summary judgment in this foreclosure action. IndyMac argues that the trial court erred in denying it

relief under the doctrine of equitable subrogation. However, finding no error in the trial court's decision, we affirm.

Background

The following facts are not in dispute in this case. In 2004, Karen Johnson (hereinafter "Johnson") granted a mortgage on her property in favor of American Bank and Trust ("ABT") in the amount of approximately $181,000. Later that year, Johnson granted another mortgage on the property worth $70,000 to E-Loan, Inc. On January 20, 2005, Johnson granted yet another mortgage on the property to IndyMac in exchange for $189,000, the majority of which was immediately used to refinance the original ABT mortgage and which fully released the ABT mortgage.[1] However, IndyMac did not immediately record its mortgage. On January 26, 2005, E-Loan, Inc. assigned its note and mortgage on the 2004 loan to Appellee, E*Trade Bank (hereinafter "E*Trade"). E*Trade recorded its mortgage on February 16, 2005. IndyMac did not file its mortgage until June 27, 2005.

Johnson defaulted on the mortgage agreement with IndyMac and, in 2007, IndyMac began foreclosure proceedings on the encumbered property. During this process, E*Trade answered and asserted that it held a lien both prior and superior to that of IndyMac. Cross-motions for summary judgment ensued. IndyMac asserted that, though its mortgage had been filed last, it was entitled to a

[1] The execution date on the title commitment document for the IndyMac mortgage was incorrectly listed as January 5, 2004. Both parties agree that this date was, and should have been listed as, January 5, 2005.

reordering of the interests under the doctrine of equitable subrogation. The trial court found against this argument and granted summary judgment in favor of E*Trade, holding that E*Trade's priority position under the Commonwealth's race-notice statute could not be overcome by an equitable doctrine. The trial court agreed with IndyMac that E*Trade was on notice of ABT's prior lien when it recorded its mortgage, but the court concluded that because E*Trade recorded its lien first and could not have been on notice of IndyMac's mortgage, it could not be "bumped" from its position of priority. IndyMac now appeals from this finding.

Standard of Review on Summary Judgment

As this case exclusively regards the trial court's order denying IndyMac's motion for summary judgment and granting the same in favor of E*Trade, we review that order *de novo*, limiting it to questions of law. *Blevins v. Moran*, 12 S.W.3d 698, 700 (Ky. App. 2000). In doing so, we inquire as to "whether the trial court correctly found that there were no genuine issues as to any material fact and that the moving party was entitled to judgment as a matter of law." *Scifres v. Kraft*, 916 S.W.2d 779, 781 (Ky. App. 1996). "The record must be viewed in a light most favorable to the party opposing the motion for summary judgment and all doubts are to be resolved in his favor." *Steelvest, Inc. v. Scansteel Serv. Ctr.*, 807 S.W.2d 476, 480 (Ky. 1991). "Even though a trial court may believe the party opposing the motion may not succeed at trial, it should not render a summary judgment if there is any issue of material fact." *Id*. It is the

movant's burden to convince the court, by the evidence of record, of the non-existence of such a material fact. *Id*. at 482.

Analysis

IndyMac argues that the trial court erred in granting summary judgment against it because, under the circumstances, it was entitled to relief under the doctrine of equitable subrogation. IndyMac contends this while acknowledging the fact that it was last to record its lien, placing it in its present predicament. It further contends that to allow E*Trade to receive the benefit of superior priority would be to allow E*Trade to be unjustly enriched.

Kentucky law regarding the priority of liens is such that "one must not only be the first to file the mortgage, deed or deed of trust, but the filer must also lack actual or constructive knowledge of any other mortgages, deeds or deeds of trust related to the property. *Wells Fargo Bank, Minnesota, N.A. v. Commonwealth Fin. and Admin., Dep't of Revenue*, 345 S.W.3d 800, 804 (Ky. 2011), as corrected, reh'g denied (August 25, 2011); *see also* Ky. Rev. Stat. ("KRS") § 382.270, *et seq*. However, an exception exists to this rule, created for equitable reasons, *i.e.*, fraud, etc.

This exception is the common law doctrine of equitable subrogation. Appellant points to *Louisville Joint Stock Land Bank v. Bank of Pembroke*, 9 S.W.2d 113 (Ky. 1928) (*overruled on other grounds*) as the "seminal" case regarding this doctrine. In that case, the Court explained

> [s]ubrogation is a creature of equity, and rests upon the principles of natural justice. Without attempting a comprehensive classification of cases in which the doctrine of subrogation may be applied, it is generally held that the right of subrogation will arise where the party claiming it has advanced money to pay a debt which, in the event of default by the debtor, he would be bound to pay; or where the one making the payment had some interest to protect; or where the money advanced to pay the debt was under an agreement with the debtor, or the creditor, express or implied, that he should be subrogated to the rights and remedies of the creditor.

9 S.W.2d at 115. In another court's words, the doctrine essentially "allows a later-filed lienholder to leap-frog over an intervening lien and take a priority position." *Hicks v. Londre*, 125 P.3d 452 (Colo. 2005).

A party seeking to invoke the doctrine of equitable subrogation bears the burden of proving the applicability of the doctrine. *Wells Fargo*, *supra*, at 807. "Although [equitable] subrogation is a highly favored doctrine, it is not an absolute right, but rather, one that depends on the equities and attending facts and circumstances of each case." *Id.* (quoting *Universal Title Ins. Co. v. U.S.,* 942 F.2d 1311, 1315 (8th Cir.1991)). "Subrogation cannot be invoked where it would violate sound public policy, or result in harm to innocent third parties." *Wells Fargo*, *supra*, at 807 (quoting *Ripley v. Piehl,* 700 N.W.2d 540, 545 (Minn. App. 2005) (*overruled on other grounds*) (internal citations omitted). "It is axiomatic that as an equitable doctrine, subrogation aids the vigilant, and not the negligent." *Id*. (internal citations and quotations omitted).

In Kentucky, application of equitable subrogation has been historically limited and recent Supreme Court decisions have sought to define these limits. In *Wells Fargo*, the Court adopted what it viewed as the best of three possible "approaches" for applying the doctrine. The adopted approach, which the Court ruled was best under "a balancing of the equities," required that equitable subrogation be barred where the subsequent lienholder has actual or constructive knowledge of an existing lien. 345 S.W.3d at 807. The Court further held that, for purposes of notice of previously filed liens, "sophisticated businesses, like professional mortgage lenders, should be held to a higher standard for purposes of determining whether the lender acted under a justifiable or excusable mistake in failing to duly investigate prior liens." *Id*.

Likewise, in *Mortgage Elec. Registration Sys., Inc. v. Roberts*, 366 S.W.3d 405 (Ky. 2012), the Supreme Court held that its rule in *Wells Fargo* gave appropriate effect to the state's race-notice statute by limiting the circumstances under which that statute may be overruled by a court. The Court ultimately concluded that the test announced in *Wells Fargo* was ideal because it ensured that "[t]he statutory scheme will be overridden by the judicially created doctrine of equitable subrogation only in those rare circumstances in which equity truly requires it." 366 S.W.3d at 412.

Like in *Wells Fargo* and *Roberts*, this case involves two "sophisticated financial institutions," both of whom are guilty, in varying degrees, of failing to record their respective mortgages promptly. It is uncontroverted in

this case that E*Trade's lien prevails under Kentucky's race-notice statute. IndyMac concedes as much on appeal. We must determine whether the trial court was correct in finding that there remained no genuine issue of material fact regarding IndyMac's claim for relief under the sole exception to that statute, equity.

This case hinges on facts which are, for the most part, undisputed and which ultimately informed the trial court's decision not to apply the doctrine of equitable subrogation. IndyMac does not dispute that it was the last to record and that it was on notice of E*Trade's mortgage at that time. IndyMac does not dispute that failure to record for nearly six months placed it in a position where equitable subrogation was the sole theory under which it could fully recover its losses. Accordingly, it is our belief that no genuine issues of material fact remain in dispute.

The remaining prong of our inquiry into the trial court's order granting summary judgment, then, is whether E*Trade was entitled to judgment as a matter of law on the question of whether IndyMac was entitled to equitable subrogation. We find that it was. While we agree with IndyMac that the doctrine of equitable subrogation remains the law in this Commonwealth, we cannot ignore the limiting effect our Supreme Court's recent decisions in *Wells Fargo* and *Roberts* had on the doctrine. We also cannot ignore the effect of these recent decisions specifically upon "sophisticated professional mortgage lenders" like IndyMac no doubt is. Given the higher standard to which IndyMac must then be

held, the trial court was correct to conclude that, as a matter of law, IndyMac's mistake in delaying the recording of its lien was inexcusable, and ultimately fatal to its claim. Furthermore, the trial court was correct in refusing to extend equitable subrogation to IndyMac, as it is clear in the law that the doctrine must not be extended to those who, but for their own negligence, would not be in such an unfavorable position. An exception to the race-notice statute is simply unjustified in such cases.

We find that the trial court was correct in granting summary judgment to E*Trade. Though the law establishing the doctrine of equitable subrogation is made, not of statute or rule, but of precedent alone, that law's guiding principles are clear and provide firm grounds upon which a court may determine whether a party is or is not entitled to summary judgment in its favor. The trial court properly did so here.

Conclusion

For the foregoing reasons, the judgment of the Warren Circuit Court granting summary judgment is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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