[Cite as *Aurora Loan Servs., LLC v. Molter,* 2010-Ohio-3704.]

COURT OF APPEALS
DELAWARE COUNTY, OHIO
FIFTH APPELLATE DISTRICT

AURORA LOAN SERVICES, LLC

Plaintiff-Appellee

-vs-

ROBERT E. MOLTER, ET AL.

Defendants-Appellants

JUDGES:
Hon. Julie A. Edwards, P. J.
Hon. John W. Wise, J.
Hon. Patricia A. Delaney, J.

Case No. 09 CAE 09 0086

O P I N I O N

CHARACTER OF PROCEEDING:	Civil Appeal from the Court of Common Pleas, Case No. 07 CVE 060733
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	August 10, 2010

APPEARANCES:

For Plaintiff-Appellee	For Defendant-Appellant New Falls
THERAN J. SELPH, SR. DENTON S. WHITNEY SELPH LAW, LTD Post Office Box 341318 Columbus, Ohio 43234	DAVID W. ORLANDINI BRIAN J. BRADIGAN, INC. 450 Alkyre Run Drive Suite 120 Westerville, Ohio 43082

Wise, J.

{¶1} Appellant New Falls Corporation appeals the decision of the Court of Common Pleas, Delaware County, which granted summary judgment and a prioritization of lien status in favor of Appellee Aurora Loan Services, LLC. The relevant facts leading to this appeal are as follows.

{¶2} The property at the center of this appeal is a residence located at 5210 Smothers Road in Westerville, Ohio, parcel number 316-33-001-087-000. At the times pertinent to this case, the owners of the residence were Robert E. Molter and Lisa C. Dyson.

{¶3} In 2004, Molter pursued a refinancing of the home. As of June 2004, there were prior unsatisfied mortgages on the home totaling approximately $595,000.00. Molter was approved for a new mortgage with Lehman Brothers Bank in the amount of $560,000.00. To help cover the shortfall, Fifth Third Bank was utilized to provide a home equity line of credit ("HELOC") in the amount of $140,000.00. Molter's loan with Lehman Brothers (assigned to Appellee Aurora in 2007) was closed by Manifest Title on June 25, 2004. Molter's HELOC with Fifth Third (assigned to Appellant New Falls subsequent to the filing of the foreclosure action sub judice) was separately closed by Chicago Title on the same day, June 25, 2004.

{¶4} As part of the closing of the Lehman Brothers loan, Manifest Title was instructed in the Loan Settlement Instructions to make sure that all subordinate financing security instruments included the following statement before recording:

{¶5} "This Security Instrument is subordinate and inferior to the Security Instrument recorded concurrently herewith."

{¶6} See Exhibit C of appellee's memorandum contra. See, also, Appendix No. 4.

{¶7} The Fifth Third Bank HELOC documents do not indicate that this subordination language was included.

{¶8} In addition, the Loan Settlement Instructions to Manifest Title instructed Manifest Title as follows:

{¶9} "Security Instrument/Rider(s) must be recorded no later than the next business day from disbursement of funds to the borrower."

{¶10} See Exhibit C, of appellee's memorandum contra and motion for summary judgment. See, also, Appendix No. 4.

{¶11} Immediately upon the closing date of June 25, 2004, Manifest Title (via an affiliate, Expedient Title) sent the Lehman Brothers mortgage and associated documents to the Delaware County Recorder's Office for recording. However, as further discussed infra, the Recorder rejected the documents due to a filing fee calculation error. Finally, on July 29, 2004 (34 days after closing), the Lehman Brothers mortgage was recorded with the Delaware County Recorder's Office in instrument #200400034791, on Book 528, Page 2074-2096. In the meantime, on July 16, 2004 (21 days after closing), Chicago Title had presented the Fifth Third HELOC (later assigned to Appellant New Falls Corporation) for recording to the Delaware County Recorder's Office. This mortgage was recorded in instrument #200400032743, on Book 525, Page 57-64.

{¶12} The funds from the Lehman Brothers loan were ultimately used to satisfy most of the prior liens on the Molter property. However, Molter thereafter defaulted on

his mortgage obligations. Accordingly, on June 20, 2007, appellee, by then assignee of the Lehman Brothers mortgage, filed a complaint in foreclosure against Molter and his wife, Lisa C. Dyson, both in their individual and co-trustee capacities, as well as Fifth Third Bank, the Delaware County Treasurer, and unknown tenants of the Smothers Road residence.

{¶13} On July 26, 2007, Fifth Third Bank filed an answer, claiming an interest in the property based on its $140,000.00 HELOC. Fifth Third made no claim of lien seniority in its answer. On March 4, 2008, Appellant New Falls filed a motion for substitution as to Fifth Third Bank, stating that an assignment of the HELOC note and mortgage was "expected within fourteen days."

{¶14} On October 14, 2008, Appellee Aurora filed a motion for partial default judgment. On October 20, 2008, the trial court granted a default judgment in favor of Appellee Aurora and against Robert E. Molter, Lisa C. Dyson, Robert E. Molter as Co-trustee for the Molter-Dyson Family Trust, and Lisa C. Dyson as Co-trustee for the Molter-Dyson Family Trust.

{¶15} On December 17, 2008, at sheriff's sale, Appellee Aurora purchased the property at issue for the sum of $445,000.00. The confirmation of sale judgment entry dated February 24, 2009 provided that the issue of priority between Appellee Aurora and Appellant New Falls was in dispute and would be subject to further order of the court.

{¶16} On May 22, 2009, Appellant New Falls filed a motion for determination of lien priority, alleging for the first time that it held the first lien on the property in question because the predecessor Fifth Third HELOC had been filed with the county recorder

first in time. On June 12, 2009, Appellee Aurora filed a memorandum contra and a motion for summary judgment.

{¶17} On August 26, 2009, the trial court, relying on the doctrine of equitable subrogation, issued a judgment entry granting summary judgment in favor of Appellee Aurora, and finding that Appellee Aurora's lien priority is senior to that of Appellant New Falls.

{¶18} On September 25, 2009, Appellant New Falls filed a notice of appeal. It herein raises the following sole Assignment of Error:

{¶19} "I. THE TRIAL COURT ERRED BY GRANTING APPELLEE AURORA LOAN SERVICES, LLC'S MOTION FOR SUMMARY JUDGMENT AND FINDING THAT APPELLEE'S LIEN HAS PRIORITY OVER THE LIEN OF APPELLANT NEW FALLS CORPORATION."

I.

{¶20} In its sole Assignment of Error, Appellant New Falls contends the trial court erred in granting summary judgment in favor of Appellee Aurora and thereby placing appellee in a lien priority position ahead of appellant. We disagree.

Standard of Review

{¶21} Summary judgment proceedings present the appellate court with the unique opportunity of reviewing the evidence in the same manner as the trial court. *Smiddy v. The Wedding Party, Inc.* (1987), 30 Ohio St.3d 35, 36, 506 N.E.2d 212. As such, we must refer to Civ.R. 56 which provides, in pertinent part: "Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence in the pending case and written

stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. * * * A summary judgment shall not be rendered unless it appears from the evidence or stipulation, and only from the evidence or stipulation, 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 or stipulation construed most strongly in the party's favor."

{¶22} Pursuant to the above rule, a trial court may not enter summary judgment if it appears a material fact is genuinely disputed. The party moving for summary judgment bears the initial burden of informing the trial court of the basis for its motion and identifying those portions of the record that demonstrate the absence of a genuine issue of material fact. The moving party may not make a conclusory assertion that the non-moving party has no evidence to prove its case. The moving party must specifically point to some evidence which demonstrates the non-moving party cannot support its claim. If the moving party satisfies this requirement, the burden shifts to the non-moving party to set forth specific facts demonstrating there is a genuine issue of material fact for trial. *Vahila v. Hall* (1997), 77 Ohio St.3d 421, 429, 674 N.E.2d 1164, citing *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 662 N.E.2d 264.

Analysis

{¶23} As an initial matter, because both parties in this appeal have accepted assignments from the 2004 mortgages, we recite the general rule that an assignee cannot receive rights superior to those held by the assignor. See, e.g., *Continental Ins. Co. v. M.B. Operating, Inc.* (Sept. 21, 1987), Stark App.Nos. 7176, 7181. We will

therefore analyze the positions of appellant and appellee based upon their respective assignor's legal and equitable rights as they arise out of the original loan arrangement.

{¶24} We first turn to R.C. 5301.23, which states in pertinent part:

{¶25} "(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.*" [Emphasis added.]

{¶26} In the case sub judice, the trial court chose to except application of R.C. 5301.23 and to instead apply the doctrine of equitable subrogation, relying in large measure on the fact that the settlement statement for the Lehman Brothers loan "clearly provides that the proceeds of that loan were to pay the 'first mortgage' and a 'second mortgage.' " Judgment Entry, August 26, 2009, at 3.

{¶27} In Ohio, "[w]hen the rights of parties are clearly defined and established by law, the courts usually apply the maxim 'equity follows the law'; however, where the rights of the parties are not so clearly delineated, the courts will apply broad equitable principles of fairness." *Blackwell v. International Union, United Auto Workers Local No. 1250* (1984), 21 Ohio App.3d 110, paragraph four of the syllabus. Traditionally, the equitable doctrine of subrogation grants relief to a party in order to prevent fraud, or to grant relief from mistake; the application of subrogation depends upon the facts and circumstances of each particular case. See *Alegis Group L.P. v. Lerner*, Delaware

App.No. 2004-CAE-05038, 2004-Ohio-6205, ¶10, (additional citations omitted). The Ohio Supreme Court, in *State Dept. of Taxation v. Jones* (1980), 61 Ohio St.2d 99, recited the general definition of equitable subrogation as that which " *** 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, citing *Federal Union Life Ins. Co. v. Deitsch* (1934), 127 Ohio St. 505. In order to claim the benefits of equitable subrogation, a party's equity must be strong and its case clear. *Jones*, supra, at 103. In addition, the basis for a claim of equitable subrogation must be readily apparent. *Bank of New York v. Fifth Third Bank of Central Ohio*, Delaware App.No. 01 CAE 03005, 2002-Ohio-352.

{¶28} Appellant, challenging equitable subrogation, points out that neither mortgage in this case states the express intent that it is to be considered a first priority lien, and neither mortgage contains subordination language requiring all other liens to be subordinate to the mortgage. Appellant also maintains that Lehman Brothers failed to adequately protect its lien by failing to include a condition within its note and mortgage that it must be placed in first lien position.

{¶29} However, the record in the case sub judice consistently confirms that Lehman Brothers and Fifth Third, the predecessors in interest to appellee and appellant, intended throughout the process of putting together and closing Molter's 2004 refinancing package that the Lehman monies would pay off the major portion of the prior mortgages against Molter's property and that the Fifth Third HELOC would pay off the small remainder of said prior mortgages. See Appellee's Appendix at Exhibit L. The

implicit understanding that Lehman would thus hold first lien priority is evidenced through the documentation provided by Lehman to its closing agent, Manifest Title, the subsequent actions of Lehman and Fifth Third through Manifest Title and Chicago Title, and Fifth Third's internal documents indicating its HELOC would be subordinate to the Lehman mortgage. Lehman further instructed Manifest to pay off all of the liens extant at the time and to record its mortgage the next day (even though the actual recording was delayed, as further discussed infra), while Fifth Third made no attempt to record its HELOC until twenty-one days after the closing.

{¶30} The lien priority status is also evident later in time, when Molter began defaulting on his loans. Fifth Third eventually concluded that there was inadequate equity to receive any payment in the foreclosure; Fifth Third therefore charged off its home equity loan to a zero balance. When Molter and Dyson, the original homeowners, filed for bankruptcy in 2008 in the United States Bankruptcy Court, Southern District of Ohio, appellant (by then the assignee of Fifth Third) admitted to holding a junior lien on the property in question. Motion for Summary Judgment, Exhibit L. Indeed, appellant took its assignment from Fifth Third subsequent to the filing of appellee's foreclosure action, thus subjecting appellant to the doctrine of lis pendens.

{¶31} Appellant nonetheless maintains that equitable subrogation is inapplicable to appellee because of the negligence of Lehman, its predecessor in interest, in assuring recordation of the Lehman mortgage. As appellant notes, Ohio courts, including the Fifth District, have refused to allow equitable subrogation to be used to benefit parties who are negligent in their business transactions or who have failed to act with ordinary and reasonable practices to establish their first priority. See *Bank of New*

York v. Fifth Third Bank of Central Ohio, Delaware App. No. 01 CAE 03005, 2002-Ohio-352; *Wells Fargo Bank, N.A. v. Dupler,* Perry App. No. 06 CA 26, 2007-Ohio-3497; *Old Republic National Title Ins. Co. v. Fifth Third Bank*, Hamilton App.No. 070567, 2008-Ohio-2059, ¶13; *State Sav. Bank v. Gunther* (1998), 127 Ohio App.3d 338; *Huntington Natl. Bank v. Allgier,* Wood App. No. WD-07-061, 2008-Ohio-1289.

{¶32} In the case sub judice, it is undisputed that appellant's mortgage was recorded first in time. Lehman's recording delay was attributable to a miscalculation of certain recording fees by Expedient Title, an affiliate of Manifest Title. The check sent by Expedient with the recording packet was rejected by the recorder's office, along with the documents to be recorded, because of an underpayment of $4.00 on a mortgage release and an overpayment of $16.00 on the Lehman mortgage. Thus, the mistaken net overpayment of $12.00 in recording fees allowed the Fifth Third HELOC to beat the Lehman mortgage (later assigned to appellee) to the recorder's office.

{¶33} The record reveals expert opinion evidence that Lehman's delay of 34 days to record its mortgage is not a customary practice. See Affidavit of Thad T. Rieger, attached as Exhibit 2 to appellant's Reply for Determination of Lien Priority. The evidence of this case also shows that Lehman failed to confirm that the Fifth Third Bank open-ended mortgage contained subordination language, in addition to failing to timely record the Lehman's mortgage with the recorder's office. Additional opinion evidence before the court was that Lehman, through its agent Manifest Title, was negligent in failing to comply with the Loan Settlement Instructions and with the applicable industry standards. See Affidavit of Thad T. Rieger, attached as Exhibit 2 to Appellant's Reply for Determination of Lien Priority.

{¶34} Accordingly, upon review, we cannot deny appellant's claim that Lehman Brothers was negligent in failing to ensure prompt recordation of Molter's 2004 mortgage. This negligence must be borne by appellee as Lehman's assignee. See *Continental Ins.,* supra. However, because our analysis is contingent on the facts and circumstances presented (*Alegis Group*, supra), we reject appellant's contention that such negligence is a bar to the application of equitable subrogation in this case.

{¶35} Clearly, "[t]he purpose of the recording statutes is to put other lien holders on notice and to prioritize the liens." *GMAC Mtg. Corp. v. McElroy,* Stark App.No. 2004-CA-00380, 2005-Ohio-2837, ¶ 16. However, since we find Fifth Third understood and had actual knowledge that its loan was to be subordinate to Lehman's, statutory notice is superfluous in this instance and would not be required to protect Fifth Third's (now appellant's) interest vis-à-vis Lehman's (now appellee's) interest. This case is thus distinguishable from instances where the negligence of a refinancing mortgagee results in an earlier recorded lien being undiscovered. Here, both Lehman and Fifth Third were participants in the 2004 refinancing deal. Likewise, both of the present parties, as assignees, had adequate opportunity to review the circumstances of their assignor's loan prior to accepting the assignments. Furthermore, as appellee maintains in its response brief, appellant should not be entitled to rely on R.C. 5301.23 to reap a windfall after taking an interest in the Fifth Third line of credit with knowledge of appellee's present claim. Under these circumstances, we hold appellee's claim for equitable subrogation is readily apparent. *Bank of New York*, supra.

{¶36} Thus, we hold that equitable subrogation does apply to protect the priority of the mortgage held by Appellee Aurora.

Conclusion

{¶37} We therefore find summary judgment in favor of appellee under equitable subrogation was properly granted as a matter of law.

{¶38} Appellant's sole Assignment of Error is overruled.

{¶39} For the reasons stated in the foregoing opinion, the judgment of the Court of Common Pleas, Delaware County, Ohio, is affirmed.

By: Wise, J.

Edwards, P. J., and

Delaney, J., concur.

/S/ JOHN W. WISE_____

/S/ JULIE A. EDWARDS_____

/S/ PATRICIA A. DELANEY_____

JUDGES

JWW/d 0511

IN THE COURT OF APPEALS FOR DELAWARE COUNTY, OHIO
FIFTH APPELLATE DISTRICT

AURORA LOAN SERVICES, LLC	:	
Plaintiff-Appellee	:	
-vs-	:	JUDGMENT ENTRY
ROBERT E. MOLTER, et al.	:	
Defendants-Appellants	:	Case No. 09 CAE 09 0086

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Court of Common Pleas of Delaware County, Ohio, is affirmed.

Costs assessed to appellant.

/S/ JOHN W. WISE

/S/ JULIE A. EDWARDS

/S/ PATRICIA A. DELANEY

JUDGES