

**COURT OF APPEALS
DECISION
DATED AND FILED**

November 14, 2012

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

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A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

**Appeal No. 2011AP2570
STATE OF WISCONSIN**

**Cir. Ct. No. 2008CV1208
2008CV1217**

**IN COURT OF APPEALS
DISTRICT II**

CSMC, INC. D/B/A CENTRAL STATES MORTGAGE CO.,

PLAINTIFF-RESPONDENT,

v.

**PAUL J. HOPPA, KIM M. HOPPA, FIRST BANKING CENTER, WOLF
PAVING COMPANY, INC., VEOLIA ENVIRONMENTAL SERVICES,
GUYER'S BUILDER SUPPLY, INC., ABC SUPPLY CO., INC., HARRIS
LUMBER COMPANY, INC. AND UNITED STATES OF AMERICA,**

DEFENDANTS,

TRI CITY NATIONAL BANK,

DEFENDANT-APPELLANT.

TRI CITY NATIONAL BANK,

PLAINTIFF-APPELLANT,

v.

**PAUL J. HOPPA, KIM M. HOPPA, FIRST BANKING CENTER, UNITED
STATES OF AMERICA, HARRIS LUMBER CO., INC., ABC SUPPLY CO.,
INC., WOLF PAVING COMPANY, INC., VEOLIA ENVIRONMENT**

SERVICES AND GUYER'S BUILDER SUPPLY, INC.,

DEFENDANTS,

CSM, INC. D/B/A CENTRAL STATES MORTGAGE COMPANY,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Waukesha County:
RALPH M. RAMIREZ, Judge. *Affirmed.*

Before Brown, C.J., Neubauer, P.J., and Higginbotham, J.

¶1 PER CURIAM. Tri City National Bank appeals from an order determining the priority of secured interests in a property sold at a sheriff's sale following foreclosure. The trial court denied Tri City's claim for equitable subrogation and granted first priority to CSMC, Inc., who, having docketed their security interest prior to Tri City, was the senior lienholder. Tri City argues that it is entitled to equitable subrogation because its loan paid off the original first mortgage. We affirm the trial court's order determining that because CSMC's Real Estate Security Agreement (RESA) was first in time, and because Tri City did not prove a justifiable expectation of subrogation, CSMC's RESA is entitled to priority over Tri City's mortgage.

¶2 In 2003, Paul and Kim Hoppa sought funding for a building project and secured a one-year, \$350,000 first mortgage from CSMC. The loan was secured with the Hoppas' primary residence as collateral. The first mortgage was recorded on November 4, 2004. Soon after, CSMC and the Hoppas entered into a

RESA¹ which allowed the Hoppas to borrow additional sums of money subject to a lien on their property. The RESA was recorded on February 8, 2005, and the Hoppas borrowed \$90,000 pursuant to the RESA. The Hoppas' payment on both the original mortgage and the RESA was due in October 2005. CSMC advised the Hoppas to obtain alternative funding to pay off the loans.

¶3 The Hoppas applied to Tri City for a \$350,000 loan in order to refinance the first mortgage held by CSMC. The Hoppas did not disclose to Tri City the \$90,000 RESA obligation owed to CSMC. The title commitment prepared in anticipation of closing failed to identify the RESA lien. Tri City approved the loan, paid off the first mortgage to CSMC, and executed a \$350,000 mortgage with the Hoppas. Tri City's security interest was recorded on October 27, 2005. The RESA between the Hoppas and CSMC remained in effect.

¶4 The Hoppas defaulted on both the Tri City and CSMC loans, and both banks commenced foreclosure actions. The actions were consolidated and both lenders obtained foreclosure judgments against the Hoppas.

¶5 After confirmation of the sheriff's sale, Tri City and CSMC sought an order from the trial court clarifying the priority of their respective security interests. Though the parties acknowledged that CSMC's RESA was recorded first, Tri City argued that its loan should have first priority under the doctrine of equitable subrogation because it replaced the original first mortgage. At an evidentiary hearing, each side presented one witness. Dawn Bainter, the loan originator for CSMC, testified that prior to closing, she sent payoff letters to Tri

¹ A bank representative testified that CMSC's practice is to execute a RESA in lieu of second or third mortgages.

City for both the first mortgage and the RESA. She did not have copies of the payoff letters and testified that due to CSMC's unrelated but serious legal troubles, it was likely that they had either been confiscated or destroyed. Bainter was adamant that she informed Tri City of both CMSC's first mortgage and its RESA.

¶6 Tri City's witness, loan originator Bruce Elliott, testified that he did not have a specific recollection of receiving or reviewing payoff letters from CSMC. He testified that contrary to standard practice, Tri City had no record of any payoff letters from CSMC in their file. Elliott conceded that some of the information used to complete Tri City's settlement statement must have come directly from CSMC and it was therefore likely that Tri City had received at least one payoff letter from CSMC. Elliott testified that Tri City did not learn of CSMC's RESA until after closing.

¶7 The trial court found that CSMC's RESA was duly recorded on February 8, 2005, and that Tri City's title company should have been able to determine the RESA's existence as part of the underwriting process. The trial court noted that Bainter and Elliott provided conflicting accounts about when Tri City first received notice of the RESA, but found that both witnesses were credible. The trial court concluded that though Tri City was unaware of the RESA when the Hoppas initially applied for the loan, it could not make a specific finding as to when Tri City first learned of the RESA's existence.

¶8 The trial court denied Tri City's request for equitable subrogation and determined that because CSMC's RESA was recorded first, it had priority over Tri City's security interest. In reaching its conclusion, the trial court considered that the RESA was "related" to CSMC's original mortgage, and that it was unable to determine when "notice" of the RESA was provided to Tri City:

... [B]ecause of the fact that [the RESA] was filed first in time, that [the RESA] was related to the initial mortgage and that there are some uncertainties about notice to Tri City about the efforts made by Ms. Bainter to let them know, there's not enough there for me to equitably find that the fact that the [RESA] filed first in time is done in a manner that it would be inequitable to do anything other than what I am doing, that is, that it's appropriate under the facts and circumstances of this case, and given the law and the documents and information that I have received to find that [CSMC] takes first priority.

¶9 Tri City appealed and by order entered August 10, 2012, this court remanded the record to the trial court for clarification. Specifically, this court asked the trial court to answer the following: (1) "Did the trial court find that Tri-City had notice of the RESA or did it find that notice was, in the court's view, an integral part of the balancing process in deciding whether Tri-City was entitled to equitable subrogation and Tri-City had not proven, to the court's satisfaction, that it did not have notice?"; and (2) "The circuit court stated in its bench decision that the RESA was 'related' to [CMSC's] mortgage. What did the court mean by the word 'related?'"

¶10 With regard to the "notice" question, the trial court clarified that it was unable to determine precisely when Tri City learned about the RESA, and therefore, considering all of the facts, it "found that the fact that the \$90,000 [RESA] was appropriately... recorded February 8th of '05, rendered a situation where that ... had priority over anything else, that had priority over the amount due and owing to Tri City." As to its finding that the RESA was "related" to the original CSMC mortgage, the trial court explained that the RESA "was part and parcel of the transaction and the agreement between the Hoppas and [CSMC]," and that the RESA was contingent and based upon the existence of the \$350,000 first mortgage.

¶11 “Subrogation is an equitable doctrine invoked to avoid unjust enrichment, and may properly be applied whenever a person other than a mere volunteer pays a debt which in equity and good conscience should be satisfied by another.” *Rock River Lumber Corp. v. Universal Mortg. Corp. of Wis.*, 82 Wis. 2d 235, 240-41, 262 N.W.2d 114 (1978). A lender may be granted subrogation where a debt is paid “in reliance upon a justifiable expectation that the lender will have security equivalent to that which his advances have discharged... provided that no innocent third parties will suffer.” *Id.* at 241. Where invoked, equitable subrogation allows assignment of the prior owner’s security interest to the new lender. *Id.* Thus, if Tri City’s mortgage was subrogated to the CSMC mortgage it paid off, it would be entitled to first priority in collecting from the sheriff’s sale proceeds.

¶12 As a threshold matter, we must determine the appropriate standard of review. Citing *Ocwen Loan Servicing, LLC v. Williams*, 2007 WI App 229, ¶6, 305 Wis. 2d 772, 741 N.W.2d 474, Tri City argues that we should independently determine whether the equities require the subrogation of Tri City’s loan to the original first mortgage. CSMC argues that though the question of whether equitable subrogation *could* apply to a set of facts is a question of law, the determination of whether it *should* apply is a question for trial court, to be reviewed for an erroneous exercise of discretion.

¶13 The appropriate standard of review is a question of law we decide independently. See *State v. Byrge*, 2000 WI 101, ¶32, 237 Wis. 2d 197, 614 N.W.2d 477. We conclude that the availability of equitable subrogation in a given circumstance, or, whether it *could* apply, is a question of law. *Ocwen*, 305 Wis. 2d 772, ¶¶1, 6, 19, 24. However, the weighing of the equities, or, whether the doctrine *should* apply to a set of facts, is an exercise of discretion for the trial

court. See *Countrywide Home Loans, Inc. v. Schmidt*, 2007 WI App 243, ¶22, 306 Wis.2d 200, 742 Wis.2d 901 (referring to review of trial court’s “discretionary determination” concerning equitable subrogation). This comports with the language in *Jindra v. Diederich Flooring*, 181 Wis.2d 579, 605, 511 N.W.2d 855 (1994), specifying that a party seeking to impose equitable subrogation must first show “that subrogation *may* or *could* apply, and then [show] that it *should* apply in equity.”²

¶14 Deferential review also accounts for the principle that subrogation is “a creature of equity, the object of which is to do substantial justice” between the parties. *Countrywide*, 306 Wis.2d 200, ¶1. A decision in equity is reviewed under the erroneous exercise of discretion standard. *Torke/Wirth/Pujara, Ltd. v. Lakeshore Towers of Racine*, 192 Wis. 2d 481, 508, 531 N.W.2d 419 (Ct. App. 1995); see also *Richards v. Land Star Group, Inc.*, 224 Wis. 2d 829, 847, 593 N.W.2d 103 (Ct. App. 1999) (the balancing of equities is “a function which requires the exercise of judicial discretion”).

¶15 We conclude that the trial court properly exercised its discretion in declining to apply equitable subrogation to prioritize Tri City’s interest. The trial court determined that the RESA was recorded first and that Tri City failed to demonstrate a justifiable expectation that its interest would be equitably subrogated to the original mortgage. The trial court found that based on the conflicting witness testimony, Tri City could not prove that it was unaware of the RESA prior to closing, and the trial court’s finding is not clearly erroneous. Given

² Further, the party seeking to impose subrogation bears both the burden of proof and the burden of persuasion. *Jindra v. Diederich Flooring*, 181 Wis. 2d 579, 599 n.10, 511 N.W.2d 855 (1994).

the circumstantial evidence that Tri City had received at least one payoff letter, the absence of these letters in its file does not prove a lack of notice and therefore does not support Tri City's justifiable expectation of subrogation.

¶16 Further, it was Tri City's duty to protect its security interest. Though the negligent title search was not Tri City's fault, neither was it the fault of CSMC, who had taken steps to properly record its security interest. Tri City could have, but did not, take additional steps to legitimize its expectation of first priority. Though Elliott testified that Tri City expected its loan would have first priority, there are no documents in its file to support this expectation, and nothing was written into the mortgage documents to preserve this expectation. *Cf. Ocwen*, 305 Wis. 2d 772, ¶17 (record supported justifiable expectation of first priority mortgage where underwriting sheet and closing instructions explicitly required verification of a first lien).

¶17 Tri City argues that prioritizing the RESA results is unjust enrichment to CSMC because CSMC benefitted from Tri City's payoff of its first mortgage. We fail to see how prioritizing a duly recorded lien resulting from an actual loan which preexisted Tri City's involvement unfairly benefits CSMC. As the trial court noted, the CSMC original mortgage and its RESA were related and it is reasonable that CSMC expected its RESA would either be paid off along with the original mortgage, or would ascend to senior lienholder status.³ CSMC

³ During the hearing held on remand, the trial court incorrectly stated that the CSMC first mortgage and its RESA were recorded contemporaneously. This does not invalidate its determination that CSMC's original mortgage and its RESA were related in the sense that the RESA was approved based on the preexisting first mortgage and that CSMC considered the RESA to be part of that mortgage, similar to a blanket lien.

properly recorded its RESA lien, and it is not due to any action by CSMC that Tri City failed to discover the lien during its underwriting process.

¶18 The doctrine of equitable subrogation exists to protect a party with a reasonable expectation of first priority and to prevent unjust enrichment. Even assuming that Tri City did not have notice of the recorded RESA prior to closing and that it expected to have first priority, it failed to take the steps necessary to protect itself and its expectation. This was not CSMC's duty. Because the trial court properly exercised its discretion to determine that the equities in this case did not favor subrogation, we affirm its decision.

By the Court.—Order affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5.

