

SUPREME COURT OF DELAWARE

Eastern Savings Bank, FSB v. CACH, LLC

124 A.3d 585 (Del. 2015) · Decided August 19, 2015

OPINION

VAUGHN, J.

VAUGHN, Justice, for the Majority: This case involves a question of priority between two lien creditors: who is entitled to be paid first from the proceeds of a mortgage foreclosure sale, the creditor who recorded its lien against the property first, or a second creditor who recorded later, but did so as part of a refinancing in which it discharged preexisting mortgages and judgment liens on the same property?

In the proceedings below, the second creditor to record its lien, Eastern Savings Bank, FSB (“Eastern Savings”), argued that the doctrine of equitable subrogation protected its right to receive the proceeds of the foreclosure sale first, even though it recorded its mortgage after the first creditor, CACH, LLC (“CACH”), recorded its judgment.

The Court of Common Pleas and the Superior Court both disagreed, and held that CACH was entitled to be paid before Eastern Savings under Delaware’s pure race recording statute.¹ Eastern Savings now appeals from the Superior Court order denying its appeal of a Court of Common Pleas’ order granting summary judgment to CACH.

On appeal, Eastern Savings contends that the Superior Court erred by failing to apply the doctrine of equitable subrogation to place the priority of its mortgage above CACH’s lien. We disagree and find that the doctrine of equitable subrogation is inapplicable to the facts of this case.

Thus, the parties’ priorities are governed by Delaware’s race recording statute, and the judgment of the Superior Court, is affirmed. I. FACTS AND PROCEDURAL HISTORY The facts of this case are not in dispute. CACH obtained a judgment against Aaron Johnson, Jr., to satisfy a deficiency balance on Johnson’s car loan on December 7, 2006. CACH transferred its judgment to the Superior Court on December 21, 2006.

As of that date, the property records reflected that Johnson individually owned property located at 19 Sanford Drive in Newark, Delaware. CACH’s judgment therefore became a lien on that property on December 21, 2006.

On December 19, two days before CACH obtained its lien on the premises at 19 Sanford Drive, Johnson engaged in a mortgage refinancing with Eastern Savings. In the course of that transaction, Johnson executed a deed conveying the property to himself and his wife, Angela, as tenants by the

entireties. Both John-sons then executed a mortgage in the amount of \$168,000 to Eastern Savings.

Loan proceeds were used to pay off five previous debts secured by liens upon the Newark property: a mortgage to Wilmington Trust Company, dated June 29, 1999; a mortgage to Pacific Shore Funding dated July 25, 2002; a judgment to- Norman E. Levine dated June 7, 2004; a judgment to the State of Delaware dated September 27, 2006; and a judgment to First Premier Bank dated March 10, 2006.

The total debt paid with Eastern Savings' funds was \$148,479.56. The CACH judgment lien, which had not yet been recorded, was not paid off as part of the refinancing. But *588the funds loaned by Eastern Savings exceeded the liens paid off by more than \$19,000, more than the amount owed on CACH's judgment lien.² The Eastern Savings mortgage was not recorded until December 29, ten days after it was executed.

According to the stipulated facts, "[a]t the time of recording a bring-down search was done by Global Title. The law office and the title company took no action at that time."³ Johnson's two previous mortgages, to Pacific Shore Funding and to Wilmington Trust Company, were satisfied as of record on January 25 and February 26, 2007, respectively.

To summarize the key dates: • Dec. 7, 2006: CACH obtained a judgment against Aaron Johnson, Jr. • Dec. 19, 2006: Johnson refinanced, and with his wife, executed a mortgage in the amount of \$168,000 to Eastern Savings. • Dec. 21, 2006: CACH recorded its judgment lien. • Dec. 29, 2006: Eastern Savings recorded its mortgage. • Jan. 25, 2007: Satisfaction of Pacific Shore Funding mortgage was recorded. • Feb.

26, 2007: Satisfaction of Wilmington Trust Company mortgage was recorded. In August 2008, Eastern Savings filed a foreclosure action against the Johnsons for the property located at 19 Sanford Drive. An attorney for CACH informed Eastern Savings' attorney that CACH's lien, then worth approximately \$16,000, was ahead of Eastern Savings' mortgage, but Eastern Savings did not respond.

On April 14, 2009, the Johnsons' property was sold at a sheriff's sale for \$133,000. Minus the costs of the sale, the sheriff sent Eastern Savings all of the proceeds, which were insufficient to satisfy the Johnsons' outstanding mortgage debt. CACH demanded that its judgment be paid by Eastern Savings. Eastern Savings refused. CACH then filed suit in the Court of Common Pleas, alleging misappropriation and unjust enrichment.

Eastern Savings filed a motion to dismiss, which the Court of Common Pleas granted. On appeal, the Superior Court reversed that decision, holding that CACH's judgment lien had been discharged at the sheriff's sale, and that CACH's lien had priority over Eastern Savings' mortgage.⁴ This Court affirmed the Superior Court's judgment, and remanded the case to the

Superior Court to be remanded to the Court of Common Pleas.⁵ Eastern Savings filed a motion for reargument, arguing that this Court did not consider whether the doctrine of equitable subrogation could move it to the front of the line.

This Court issued an order clarifying that: When we concluded... that the record did not reflect that proceeds from appellant's mortgage were used to pay off a prior mortgage on the property, we did not intend to preclude a presentation of facts that could show otherwise.

To the extent that our Opinion... could be read to bar the presentation of facts supporting a claim of equitable subrogation,⁵⁸⁹ we have granted reargument. We believe the issue could be fairly presented to the Court of Common Pleas.⁶ Accordingly, on remand, the Court of Common Pleas considered Eastern Savings' claim that the doctrine of equitable subrogation applies, such that Eastern Savings was first in priority and thus had the right to all of the proceeds from the sheriff's sale.

The Court of Common Pleas held that the doctrine was not applicable to the facts of this case, both because equitable subrogation does not apply to mortgage refinances in Delaware, and because Eastern Savings had not satisfied all of the elements required to warrant subrogation.⁷ The Superior Court affirmed, finding that equitable subrogation was not available to overcome Delaware's race recording statute.⁸ This appeal followed.

II. ANALYSIS “We review the Superior Court's grant or denial of a summary judgment motion de novo.”⁹ A. Delaware's Pure Race Recording Statute In Delaware, the priority of mortgages is governed by 25 Del. C. § 2106. Section 2106 is a pure race statute, providing that the time of recording is determinative of the priority of competing creditors.¹⁰ “The rule is first in time, first in right.”¹¹ Specifically, § 2106 provides that: A mortgage, or a conveyance in the nature of a mortgage, of lands or tenements shall have priority according to the time of recording it in the proper office, without respect to the time of its being sealed and delivered, and shall be a lien from the time of recording it and not before.¹² In the case at bar, CACH recorded its judgment lien against Johnson on December 21, 2006, eight days before the Eastern Savings mortgage was recorded.

Thus, the CACH judgment has priority over the Eastern Savings Mortgage under the race recording statute. Eastern Savings, however, contends that the doctrine of equitable subrogation should be applied to allow it to take priority over the CACH judgment. Eastern Savings argues that the doctrine of equitable subrogation is applicable to a mortgage refinancing, and that it has satisfied the elements required to be subrogated in this case.

Eastern Savings contends that because it paid the preexisting mortgages and judgments on the Johnsons' property, it stepped into the shoes of those previous lien-holders for purposes of being first in priority to receive the proceeds from the foreclosure sale. CACH responds that Eastern

Savings cannot jump ahead in priority, both because equitable subrogation does not apply to mortgage refinances in Delaware, and because Eastern Savings has not satisfied the requirements to be subrogated on the facts of this case. *590B.

The Doctrine of Equitable Subrogation Equitable'subrogation is a doctrine that “allows one who has discharged the debt of another to succeed to the rights of the satisfied creditor.”¹³ For example, if Creditor # 3 pays off a debt owed to Creditor # 1 by the same debtor, equitable subrogation would enable Creditor # 3 to jump ahead of Creditor # 2 in priority for repayment.

The doctrine, which began in the English courts of equity as a way for a surety to seek repayment from a defaulting debtor,¹⁴ has been applied by the Delaware Court of Chancery for over a century.¹⁵ Under the Court of Chancery's precedent, there are five elements necessary to establish a claim for equitable sub-rogation; (1) payment must have been made by the subrogee to protect his or her own interest; (2) the subrogee must not have acted as a volunteer; (3) the debt paid must have been one for which the subrogee was not primarily liable; (4) the entire debt must have been paid; and (5) subrogation must not work any injustice to the rights of others.¹⁶ As in other jurisdictions,¹⁷ the Court of Chancery has expanded its use of the doctrine beyond its narrow origins for other equitable reasons.¹⁸ No Delaware court, *591however, has ever applied the doctrine to enable a mortgage lender who funds a homeowner's refinancing to assume the position of the original lender..Nevertheless, the Appellant relies on two Court of Chancery cases to support its claim that the doctrine should be applied to the facts of this case.

In *Stoeckle v. Rosenheim*, á case from 1913, there were three competing mortgages.¹⁹ Stoeckle, the second mortgage-holder, paid off the first mortgage, erroneously believing at the time that the third mortgage-holder's mortgage had also been paid off in full. Based on the specific facts of the case, the Court of Chancery deemed Stoeckle's mistake to be a reasonable one, and reinstated the first mortgage for the benefit of Stoeckle.

The Court of Chancery also granted Stoeckle's request for a preliminary injunction to stay the foreclosure proceedings brought by the third mortgage-holder.²⁰ In that case, Stoeckle paid off the first mortgage in order to protect his interest in the second mortgage which he held. 25 Del. C. § 2106 was neither discussed nor implicated in the decision. More recently, in *Oldham v. Taylor*, the Court of Chancery applied the doctrine of equitable subrogation to prevent unjust enrichment.²¹ In that case, three members of a family owned a property subject to two mortgages.

Two of the family members, who together owned a one-half interest in the property, refinanced by paying off the two existing mortgages with the proceeds of a new loan without informing the third family member, Oldham.²² The two family members executed a note and a mortgage on the entire property (including Oldham's one-half interest) in favor of the new lender, Associates Financial Services Company, Inc. (“AFS”).

After Oldham learned what had happened, she filed an action in the Court of Chancery contending that the new mortgage was void and unenforceable against her, and sought to quiet title with regards to her one-half interest.²³ The Court of Chancery determined that the AFS mortgage was unenforceable against the plaintiff, but that she was still liable to AFS or the defendants under the doctrine of equitable subrogation.²⁴ The court found that it would unjustly enrich Oldham if she was not responsible for any portion of the mortgage debt, and accordingly required her to pay half of the balance of the two previous mortgages.²⁵ The *592Court of Chancery observed that the plaintiff would have, “[otherwise,... receive[d] an unearned windfall by being discharged from liability on the mortgage debts without having paid any consideration.”²⁶ In reaching its conclusion, the court explained that “subrogation rights arise to prevent unjust enrichment of a party whose obligation is fully performed by another.”²⁷ C. The Doctrine of Equitable Subrogation is Inapplicable Here Unlike Stoeckle and Oldham, there was no reasonable mistake or unjust enrichment in this case.²⁸ Nor is there any other equitable reason as to why the doctrine of equitable subrogation should be applied.

Thus, the question becomes: should Delaware permit refinancing lenders to jump ahead in priority when the funds that they disburse are used to pay off pre-existing mortgages, absent any other equitable reason? We decline to extend the equitable doctrine’s reach to such circumstances. Equitable subrogation has never been used to undercut the authority of a Delaware statute without equitable cause.

When, as here, there is no equitable reason to set aside the provisions of Delaware’s pure race recording statute, the *593rule of “first in time, first in right” governs the priority of the parties’ competing claims. CACH recorded its judgment lien eight days before Eastern Savings recorded its mortgage. If the mortgage had been timely recorded with a proper bring-down title search, the issue of the CACH lien would have been avoided, or revealed and addressed.

Eastern Savings has an adequate legal remedy at its disposal:²⁹ pursuing a claim against Global Title and/or the settlement agent for the amount of the proceeds it pays to CACH. We will not apply the doctrine of equitable subrogation to cure the failure of Eastern Savings’ title insurer or settlement agent to ensure that Eastern Savings’ was placed in a first lien position before completing the settlement process.

Moreover, Delaware courts have refused to apply subrogation when it would “work any injustice to the rights of others.”³⁰ Eastern Savings argues that CACH would not be disadvantaged because its lien was always behind the other mortgages and judgment liens that Eastern Savings’ funds paid to satisfy. But to say that CACH is in no worse of a position than it would have been had Johnson not entered into the refinance focuses only on CACH’s position in priority, and ignores the fact that Eastern Savings’ loan left Johnson further in debt than he was beforehand.

Eastern Savings' argument also ignores the fact that CACH did not bargain for its subordinate position. In other cases in which courts have applied the doctrine of equitable subrogation, the intervening lien-holder was another mortgage lender who had agreed when lending money to be third or fourth in priority.³¹ By contrast, here, CACH's property lien was obtained as a result of a judgment from the Court of Common Pleas.

It therefore never agreed to be subordinated to another mortgage loan, and it therefore will not receive an "unearned windfall" if it is paid the amount of the judgment to which it is entitled by law.³² *594III. CONCLUSION For all of the preceding' reasons, the judgment of the Superior Court is AFFIRMED.. See 25 Del C. § 2106..

The exact amount of CACH's lien at the time it was recorded is not in the record, but it could not have been more than \$16,000, the amount owed to CACH at the time Eastern Savings filed its foreclosure action against the Johnsons.. Appellant's Op. Br. at 3.. CACH, LLC v. E. Sav. Bank, FSB, 2011 WL 4730525, at *5 (Del. Super. Sept. 30, 2011).. E. Sav. Bank, FSB v. CACH, LLC, 55 A.3d 344, 346, 351 (Del.

2012).. E. Sav. Bank, FSB v. CACH, LLC, 2012 WL 9298300, at *1. (Del. Oct. 30, 2012).. CACH, LLC v. E. Sav. Bank, FSB, C.A. No. CPU4-09-009022 (Del. Com. Pi. June 3, 2013).. E. Sav. Bank, FSB v. CACH, LLC, 2014 WL 3827496, at *4-5 (Del. Super. July 31, 2014).. ConAgra Foods, Inc. v. Lexington Ins. Co., 21 A.3d 62, 68 (Del. 2011)..

First Mortg. Co. v. Fed. Leasing Corp., 456 A.2d 794, 795 (Del. 1982).. Id.. 25 Del. C. § 2106.. E. Sav. Bank, FSB, 55 A.3d at 351 (quoting Reserves Dev. LLC v. Severn Sav. Bank, FSB, 2007 WL 4054231, at *17 (Del. Ch. Nov. 9, 2007)) (internal quotations omitted).. Gregg H. Mosson, Comment, Equitable Subrogation in Maryland Mortgages and the Restatement of Property: A Historical Analysis for Contemporary Solutions, 41 U. Balt.

L.Rev. 709, 715 (2012).. See Miller v. Stout, 5 Del.Ch. 259, 261 (1878) ("When a surety of guarantor pays a debt of a principal, equity substitutes him in the place of a creditor, as a matter of course, without any special agreement to that effect.").. Reserves Dev. LLC v. Severn Sav. Bank, FSB, 2007 WL 4054231, at *17 (Del. Ch. Nov. 9, 2007) aff'd, 961 A.2d 521 (Del.

2008).. See Mosson, supra note 14, at 717 ("By the end of the 1800s in America, subrogation had expanded to apply' to refinancing lenders in some jurisdictions.... By the 1920s and 1930s, American subrogation covered various. just claims by plaintiffs to stand in another's shoes and seek repayment.").

The majority of states still do not permit those with actual notice of the pre-existing lien to move up in priority, and a minority of jurisdictions do not permit a party with either actual or constrictive (i.e., record) knowledge to be subrogated. 73 Am. Jur. 2d Subrogation § 58 (1974);

see also Glenn R. McGillivray, What's your priority?: Revitalizing Pennsylvania's Approach to Equitable Subrogation of Mortgages After First Commonwealth Bank v. Heller, 58 Vill.

L.Rev. 301, 310 (2013). For two cases in which courts have rejected the broader application of equitable subrogation and adopted the minority view, see Wells Fargo Bank, Minn., N.S. v. Ky., Fin. & Admin., Dep't of Revenue, 345 S.W.3d 800, 807-08 (Ky. 2011) ("[T]he Court observes that equity demands that 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 of fact in failing to duly investigate prior liens.

Equity also demands that the responsibility for a defective title examination be allocated to the party who is most culpable.") (internal citations omitted); Countrywide Home Loans, Inc. v. First Nat'l Bank of Steamboat Springs, N.A., 144 P.3d 1224, 1230 (Wyo.2006) ("Having considered our statute and the cases from other states in which courts have applied equitable subrogation in the context of mortgage re-financing, we decline to •adopt the Restatement.

Unlike the trend in other courts, we are not persuaded any manifest injustice results from applying the express language of [Wyoming's recording statute] and adhering to the clear legislative intent that lien priority in Wyoming is to be determined by the date of recording.").. See, e.g., E. States Petroleum Co. v. Universal Oil. Prods. Co., 44 A.2d 11, 15 (Del.

Ch. 1945) ("Originally, that remedy might have *591been largely confined to cases involving the relation of principal and surety, but it now has a much broader application; and when right and justice demand it the tendency is to extend, rather than to restrict, its application.").. Stoeckle v. Rosenheim, 87 A, 1006, 1007 (Del. Ch. 1913)..

The Court of Chancery reasoned: [T]he overlooking by the complainants of the right to be subrogated to the rights of the first mortgagee, or to be treated as the equitable assignees of that mortgage, is to be considered in this court as analogous to, if not identical with, a mistake of fact, and, therefore, entitles the second mortgages to relief from the consequences of such.a mistake.

Id. at 1008.. 2003 Wt 21786217, at *5 (Del. Ch. Aug. 4, 2003).. Id. at *2.. Id. at *3-4.. Oldham, 2003 WL 21786217, at *4-5.. Id. at *4-5. "The basis for this argument is that under the doctrine of subrogation, Old-ham's liability to pay that previous mortgage debt was shifted from the prior mortgage lenders'to [the new lender] when [it] paid those prior mortgage creditors off.

That is, *592metaphorically speaking, [the new lender] stepped into the shoes of the former mortgage lenders, with the result that after the refinancing, Oldham's obligation to repay her share of the preexisting mortgages ran to [the new lender]." Id. at *4.. Id. at *5.

The Oldham Court applied the doctrine of equitable subrogation to remedy a finding of unjust enrichment. Oldham, 2003 WL 21786217, at *5. "Unjust enrichment is the unjust retention of a

benefit to the loss of another, or the retention of money or property of another'against the fundamental principles of justice or equity and good conscience.” *Nemec v. Shrader*, 991 A.2d 1120, 1130 (Del.

2010) (quoting *Fleer Corp. v. Topps Chewing Gum, Inc.*, 539 A.2d 1060, 1062 (Del. 1988)) (internal quotations omitted).. *Oldham*, 2003 WL 21786217, at *5. This case provides little support for the Appellant's claim. As the Superior Court stated in its opinion, "[a]lthough the Oldham Court uses the language of equitable subrogation, the Court of Common Pleas considered the analogy to this matter before the Court, and determined that, conceptually, Oldham is better understood as relying on a more general theory of unjust enrichment.” E. Sav.

Bank, FSB, 2014 WL 3827496, at *5.. In order to show unjust enrichment, there must be: "(1) an enrichment, (2) an impoverishment, (3) a relation between the enrichment and impoverishment, (4) the absence of justification, and (5) the absence of a remedy provided by law.” *Nemec*, 991 A.2d at 1130. Eastern Savings argues that the Superior Court's judgment will unjustly enrich CACH at its expense.

But there is no hardship to Eastern Savings, who presumably contracted with Global Title so that it would be protected in the event that the title search failed to turn up any missing liens. Because Eastern Savings obtained tide insurance, it has an adequate legal remedy at its disposal: pursuing a claim against Global Tide for the amount of the proceeds it pays to CACH.

Cf. *Wells Fargo Bank, Minn., N.A.*, 345 S.W.3d at 808 ("However, the Court presumes that both lending institutions involved in this case have viable claims against their respective title insurance companies. Those tide insurers are engaged in the very profitable business of assuring that their lending institution customers receive a clear title by insuring such.

If the title insurer's examiners bungle the title search, no matter how innocent the mistake might be, then the tide insurers must ultimately be held liable.”); *ABN AMRO Mortg. Grp. v. Kangah*, 126 Ohio St.3d 425, 934 N.E.2d 924, 927 (2010) ("ABN would not be seeking equitable subrogation but for someone's negligence. That circumstance alone was enough to defeat equitable subrogation in *Jones*.

Whether ABN or the title insurance company it employed was negligent is uncertain. If the tide insurance company was negligent, ABN may have a claim against it for its loss, negating its need for equitable subrogation.”).. *Chavin v. H.H. Rosin & Co.*, 246 A.2d 921, 922 (Del. 1968) ("It is, of course, axiomatic that Equity has no jurisdiction over a controversy for which there is a complete and adequate remedy at law.”)..

Reserves Dev. LLC, 2007 WL 4054231, at *17 (quoting 73 Am. Jur. 2d Subrogation § 5 (2007)).. See, e.g., *Bank of America, N.A. v. Prestance Corp.*, 160 Wash.2d 560, 160 P.3d 17, 23-24 (2007) (concluding that equitable subrogation should apply to prevent an unearned windfall to Bank of

America, who had agreed to provide the borrower with a line of credit on a property that was already subject to another mortgage; it was the new lender's understanding that Bank of America's deed of trust would be reconveyed following the refinance and thus the new lender would be first in priority)..

Cf. *Mortg. Elec. Registration Sys., Inc. v. Roberts*, 366 S.W.3d 405, 411 (Ky. 2012) ("MERS argues that if the Court of Appeals' decision stands, Roberts will have received an 'unearned windfall' merely because of New Century's (and MERS's) mistake in running the title searches. But what will happen in this case is not a true 'windfall.' Certainly, Roberts will benefit by gaining first priority.

It becomes more likely that he will receive the full amount of his \$25,894.63 judgment against the homeowners when the property is sold, because the proceeds will go to pay his lien first. But he will only get exactly what he is already entitled to: the amount of the judgment. And it is inaccurate to claim, as MERS does, that this course of events causes Roberts to get something better than what he expected when he placed the lien on the property.

When Roberts recorded the judgment lien in June 2000, his expectation was that he would have second priority to The Money Store's mortgage, but that he would have superior priority to all subsequent interests. New Century could have obtained a subordination agreement from Roberts, but it did not (apparently because it failed to locate Roberts' lien by doing a proper title search).

And so Roberts moved into first priority. This is not a windfall; it is the way a race-notice recording scheme works.”).