[Cite as *First Fin. Bank, N.A. v. Grimes,* 2011-Ohio-3907.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

BUTLER COUNTY

FIRST FINANCIAL BANK, N.A.,	:	
Plaintiff-Appellee,	:	CASE NO. CA2010-10-268
	:	O P I N I O N
- vs -		8/8/2011
	:	
DENNIS E. GRIMES, et al.,	:	
Defendants-Appellants.	:	

CIVIL APPEAL FROM BUTLER COUNTY COURT OF COMMON PLEAS
Case No. CV2009-08-3775

Parrish, Marcum, Hirka & Trokhan Co., LPA, Sara C. Hirka, 300 High Street, Suite 704, P.O. Box 747, Hamilton, Ohio 45012, for plaintiff-appellee

Dennis E. Grimes and Regina L. Grimes, 2750 Minton Road, Hamilton, Ohio 45013, defendants, pro se

Mortgage Electronic Registration Systems, Inc., P.O. Box 2026, Flint, Michigan 48501-2026, defendant

Americas Wholesale Lender, P.O. Box 660694, Dallas, Texas 75266-0694, defendant

Luper Neidenthal & Logan, Gregory Hall Melick and Jeffrey R. Jinkens, 50 West Broad Street, Suite 1200, Columbus, Ohio 43215, for defendant-appellant, Bank of America

HUTZEL, J.

{¶1} Defendant-appellant, Bank of America, appeals the judgment of the Butler

County Court of Common Pleas denying its motion to vacate a default judgment in favor of plaintiff-appellee, First Financial Bank. For the reasons outlined below, we reverse the decision of the trial court.

{¶2} This case involves a dispute over the order of priority of liens on real property located at 2450 Minton Road, Hamilton, Ohio 45013 ("the property"). In 1998, Dennis and Regina Grimes ("the Grimes") executed a first mortgage on the property to America's Wholesale Lender ("America's Wholesale mortgage") in the amount of $190,000. The America's Wholesale mortgage was recorded on December 3, 1998.

{¶3} On October 21, 2004, the Grimes executed a second mortgage in favor of First Financial Bank ("First Financial mortgage") in the approximate amount of $188,000. The First Financial mortgage was recorded on November 8, 2004.

{¶4} In 2005, the Grimes sought to refinance and thus executed a third mortgage in favor of Countrywide Home Loans, Inc. ("Countrywide mortgage") in the amount of $342,000. The Countrywide mortgage was recorded on November 30, 2005. At closing, it is undisputed that $191,211.77 was used to pay off the America's Wholesale mortgage. However, the parties dispute whether a portion of the Countrywide mortgage proceeds was used to pay off the First Financial mortgage. Bank of America claims that $187,590.52 was used to pay off the First Financial mortgage, while First Financial claims there is no reliable evidence of any such transaction.

{¶5} On August 26, 2009, First Financial filed a complaint for foreclosure on its mortgage. In its complaint, First Financial named the Grimes and America's Wholesale as defendants. During the pendency of First Financial's foreclosure action, Countrywide assigned its mortgage to defendant-appellant, Bank of America. Bank of America recorded its interest on September 17, 2009.

{¶6} On February 17, 2010, Bank of America filed a motion to intervene as a

defendant in First Financial's foreclosure action pursuant to Civ.R. 24(A)(2). Before ruling on Bank of America's motion, the trial court granted default judgment in favor of First Financial against the Grimes and America's Wholesale after both parties failed to appear. After granting default judgment, the trial court held a hearing regarding Bank of America's motion to intervene. On May 4, 2010, the trial court granted Bank of America's motion.

{¶7} Bank of America subsequently moved to vacate the default judgment pursuant to Civ.R. 60(B), arguing it had a meritorious defense based on the doctrine of equitable subrogation. In conjunction with the remaining requirements of Civ.R. 60(B), Bank of America asserted various grounds for relief under Civ.R. 60(B)(1)-(5) and was able to demonstrate that the motion was timely. See *GTE Automatic Elec., Inc. v. ARC Industries, Inc.* (1976), 47 Ohio St.2d 146.

{¶8} On September 9, 2010, the trial court denied Bank of America's motion to vacate. The trial court found the doctrine of equitable subrogation was inapplicable, and as a result, found Bank of America failed to assert a meritorious defense. See id. Instead, the trial court found the case was governed by the doctrine of lis pendens.[1]

{¶9} Bank of America appeals, raising three assignments of error for review. For ease of analysis, we will address Bank of America's assignments of error out of order.

{¶10} Assignment of Error No. 3:

{¶11} "THE TRIAL COURT ERRED IN DENYING BANK OF AMERICA'S 60(B) MOTION FOR RELIEF, IN FINDING THAT BANK OF AMERICA HAD NO MERITORIOUS CLAIM OR DEFENSE WITH RESPECT TO THE JUDGMENT ENTERED IN FAVOR OF FIRST FINANCIAL."

{¶12} In its third assignment of error, Bank of America argues the trial court erred

1. By this doctrine, generally, "someone who acquires an interest in property that is the subject of litigation is as bound by the result of the litigation as if he had been a party to it himself." *Beneficial Ohio, Inc. v. Ellis*, 121 Ohio St.3d 89, 2009-Ohio-311, ¶8.

in denying its motion to vacate based upon a finding that it failed to assert a meritorious defense. Specifically, Bank of America argues the doctrine of equitable subrogation is a meritorious defense, pursuant to which Bank of America's mortgage should have been found superior to the First Financial mortgage.

{¶13} In overruling Bank of America's motion to vacate, the trial court found that Bank of America's predecessor in interest, Countrywide, executed its loan "fully aware of the [Grimes'] obligations under the previous mortgages," namely, the America's Wholesale and First Financial mortgages. Accordingly, the trial court rejected Bank of America's defense and instead applied the doctrine of lis pendens, which states that "one who acquires an interest in property which is at the time involved in litigation * * * takes subject to the judgment or decree, and is as conclusively bound by the result of the litigation as if he had been a party thereto from the outset." *Cook v. Mozer* (1923), 108 Ohio St. 30, syllabus. However, because we find Bank of America asserted a valid Civ.R. 60(B) claim, we disagree with the trial court's decision.

{¶14} To prevail on a motion to vacate a judgment pursuant to Civ.R. 60(B), the movant must demonstrate: (1) the party has a meritorious defense to present if relief is granted; (2) the party is entitled to relief under one of the grounds stated in Civ.R. 60(B)(1) through (5); and (3) the motion is made within a reasonable time, and where the grounds of relief are Civ.R. 60(B)(1), (2), or (3), not more than one year after the judgment. *GTE*, 47 Ohio St.2d at paragraph two of the syllabus. Where timely relief is sought from a default judgment and the movant has a meritorious defense, doubt should be resolved in favor of the motion to set aside the judgment so that cases may be decided on their merits. Id. at paragraph three of the syllabus. Our standard of review of a court's decision as to whether to grant a Civ.R. 60(B) motion is abuse of discretion. Id. at 148. Failing to meet one of the *GTE* factors is fatal, for all three must be satisfied in order to gain relief.

See, e.g., *Bank of New York Mellon v. Flack*, Stark App. No. 2010CA00153, 2011-Ohio-890, ¶11.

{¶15} R.C. 5301.23 establishes the general rule regarding priority of mortgages. Under R.C. 5301.23(A), the first mortgage recorded "shall have preference." The doctrine of equitable subrogation, however, is sometimes applied by courts to overcome this statutory principle of "first in time, first in right." *Ford Homes, Inc. v. Bobie*, Butler App. No. CA2008-09-220, 2009-Ohio-677, ¶13.

{¶16} Subrogation generally substitutes one party in the place of another regarding the other's claim or right. Id. at ¶14, citing *State, Dept. of Taxation v. Jones* (1980), 61 Ohio St.2d 99. Conventional subrogation focuses upon the contractual obligations of the parties, which compel a payor-creditor to be substituted for the creditor discharged by the payor's loan. *Jones* at 101. By contrast, legal (or equitable) subrogation arises by operation of law when one party 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. *Fed. Union Life Ins. Co. v. Deitsch* (1934), 127 Ohio St. 505, 510.

{¶17} Equitable subrogation is, essentially, a theory of unjust enrichment. *Bobie*, 2009-Ohio-677 at ¶15. The doctrine of equitable subrogation serves to prevent fraud and to provide relief from mistakes. *Jones*, 61 Ohio St.2d at 102. A party seeking to benefit from equitable subrogation must have strong equity and a clear case. Id. Whether or not a party is entitled to equitable subrogation depends upon the facts and circumstances of each case. Id.

{¶18} The Ohio Supreme Court has considered various factors when balancing the equities in equitable subrogation cases. In *Jones*, "the negligence of the lender was the only significant factor that [the Court] considered." Id. at 103. See, also, *ABN AMRO*

Mtge. Group, Inc. v. Kangah, 126 Ohio St.3d 425, 2010-Ohio-3779, ¶12. In *Deitsch*, the Court applied equitable subrogation because "[n]o greater burden was placed on the [holder of the secondary mortgage] than [it] would have borne if the [first] mortgage * * * had not been released." *Deitsch*, 127 Ohio St. at 512. In sum, the doctrine of equitable subrogation favors parties whose negligence did not contribute to their current status, and circumstances where subordinate lenders would bear no additional burden as a result of the subrogation.

{¶19} In the case at bar, it is undisputed that Countrywide satisfied the first mortgage on the property, which was held by America's Wholesale, presumably with the intention of taking the priority of that mortgage. Since the First Financial mortgage was already subject to the America's Wholesale mortgage, we are unable to see how it would be harmed by giving Countrywide's assignee, Bank of America, priority to this extent. See *TCIF REO GCM, L.L.C. v. Natl. City Bank*, Cuyahoga App. No. 92447, 2009-Ohio-4040, ¶19; *Deitsch*, 127 Ohio St. at 512. See, also, *Washington Mut. Bank, FA v. Aultman*, 172 Ohio App.3d 584, 2007-Ohio-3706 (where lender opposing equitable subrogation was originally in the second lien position, and a subordinate lender sought subrogation only to the extent that it paid off the first mortgage, the equity was strong and the doctrine of equitable subrogation applied).

{¶20} However, under the current state of the record, it is impossible to determine the priority between the Bank of America and First Financial mortgages. The record is curiously unclear as to whether Countrywide satisfied and discharged the First Financial mortgage upon closing. In fact, in its decision, the trial court admitted "[t]he record is deficient as to what actually happened to the money received at [Countrywide's] closing." Under such circumstances, we fail to see how the trial court could have determined whether Bank of America's subrogation claim was meritorious, absent evidence as to

whether Countrywide discharged the First Financial mortgage. Civ.R. 60(B). See, also, R.C. 5301.232(D) (requiring written notice to be issued to the holder of an open-end mortgage to confirm an account is properly closed and released). For purposes of this analysis, we will provide two alternative scenarios with respect to priority between the parties.

{¶21} Under the first scenario, we would assume Countrywide satisfied and properly discharged the First Financial mortgage. In such a case, the failure to subrogate Bank of America, as Countrywide's assignee, would have been the result of a mistake, rather than any negligence attributable to Countrywide. See *Jones*, 61 Ohio St.2d at 102; *Deitsch*, 127 Ohio St. at 512.

{¶22} Under the second scenario, we would assume Countrywide failed to take the actions necessary to satisfy and/or discharge the First Financial mortgage. In such a case, Countrywide's negligence would defeat a claim for equitable subrogation. See *Genoa Banking Co. v. Tucker*, 184 Ohio App.3d 303, 2009-Ohio-4918, ¶18 ("the doctrine of equitable subrogation does not apply so as to benefit parties seeking the remedy despite their own negligence in the underlying business transaction"). Under these circumstances, Bank of America would be forced to bear the consequences of Countrywide's negligence and it would not be entitled to equitable subrogation over the First Financial mortgage. See id. at ¶18, 23; *Aurora Loan Servs., LLC v. Molter*, Delaware App. No. 09 CAE 09 0086, 2010-Ohio-3704, ¶34.

{¶23} Based upon the record before us, we cannot determine which scenario this case entails. However, because we find Bank of America demonstrated all three *GTE* factors, we relinquish this task to the trial court. *GTE*, 47 Ohio St.2d at 148. Specifically, we find Bank of America demonstrated its motion was timely and that it had a meritorious defense, at least with respect to priority over the America's Wholesale mortgage. Id.

Bank of America also established the remaining *GTE* requirement; specifically, that it was entitled to relief from judgment, primarily under Civ.R. 60(B)(5), or, conceivably, as otherwise asserted in its motion. Id.

{¶24} We therefore find the trial court abused its discretion in denying Bank of America's motion to vacate the default judgment. Upon remand, the trial court must determine whether the First Financial mortgage was satisfied and properly discharged, and if so, whether equity entitles Bank of America to first lien priority under the doctrine of equitable subrogation.

{¶25} Accordingly, Bank of America's third assignment of error is sustained. Because this ruling is dispositive of the matter, we decline to address Bank of America's remaining assignments of error. See App.R. 12(A)(1)(c).

{¶26} The matter is reversed and remanded for further proceedings consistent with this opinion.

RINGLAND, P.J., and PIPER, J., concur.