[Cite as *Bank of New York Mellon Trust Co. v. Zeigler*, 2010-Ohio-4968.]

COURT OF APPEALS
RICHLAND COUNTY, OHIO
FIFTH APPELLATE DISTRICT

THE BANK OF NEW YORK MELLON TRUST COMPANY	:	JUDGES:
	:	Hon. W. Scott Gwin, P.J.
Plaintiff-Appellee	:	Hon. William B. Hoffman, J.
	:	Hon. Patricia A. Delaney, J.
-vs-	:	
	:	Case No. 2010 CA 0065
GEORGE W. ZEIGLER, JR., et al.	:	
	:	
	:	
Defendants-Appellant	:	O P I N I O N

CHARACTER OF PROCEEDING:	Appeal from the Richland County Court of Common Pleas, Case No. 2009CV0356
JUDGMENT:	REVERSED AND REMANDED
DATE OF JUDGMENT ENTRY:	October 8, 2010

APPEARANCES:

For Defendant-Appellant,
Richland Bank:

ERIC S. MILLER
13 Park Ave. W., Suite 608
Mansfield, OH 44902

For Plaintiff-Appellee,
Bank of New York

MARIA MARIANO GUTHRIE
685 S. Front St.
Columbus, OH 43206

RACHEL A. LEIER
P.O. Box 165028
Columbus, OH 43216

Delaney, J.

{¶1} Defendant-Appellant Richland Bank appeals the April 23, 2010 judgment entry of the Richland County Court of Common Pleas granting summary judgment on the issue of priority to Plaintiff-Appellee, Bank of New York Mellon Trust Company.

STATEMENT OF THE FACTS AND CASE

{¶2} In 1985, Defendants, George W. Zeigler, Jr., and Susan M. Zeigler purchased residential property located at 808 Cypress Dr., Mansfield, Ohio.

{¶3} The Zeiglers executed a mortgage on their home in the amount of $146,250 with Society National Bank ("Society National Bank mortgage"). The mortgage was recorded on March 22, 1994.

{¶4} On November 13, 1998, the Zeiglers executed a mortgage in favor of Richland Bank in the amount of $285,000 for the purposes of a commercial loan. The Richland Bank mortgage encumbered the Zeiglers' residential property as well as the Zeiglers' commercial property located at 945 N. Trimble Road, Mansfield, Ohio. Richland Bank was aware that it was second to the Society National Bank mortgage.

{¶5} On November 24, 2003, the Zeiglers refinanced the Society National Bank mortgage by executing an Adjustable Rate Note in the amount of $259,350 in favor of Regions Bank. The Note was secured by a mortgage encumbering the residential property to Regions Bank as lender, and Mortgage Electronic Registration Systems, Inc. ("MERS") as nominee for Regions Bank. Regions Bank intended that its mortgage would be the first and best lien on the residential property.

{¶6} At closing, $115,958.34 of the loan proceeds from Regions Bank was used to pay off the Society National Bank mortgage. On March 5, 2004, the Society

National Bank mortgage was released of record in the Richland County Recorder's Office.[1]

{¶7} Richland Bank was not aware that the Zeiglers refinanced the Society National Bank mortgage. An affidavit from Mike A. Jefferson, commercial loan officer with Richland Bank, states that Regions Bank never contacted Richland Bank in regards to the refinancing. Neither Bank of New York nor Richland Bank has presented Civ.R. 56(C) evidence to show that at the time of the refinancing of the Society National Bank mortgage, Regions Bank had actual or constructive knowledge of the Richland Bank mortgage.

{¶8} On March 2, 2009, MERS assigned the Regions Bank mortgage to Bank of New York. (Henceforth, the Regions Bank mortgage will be known as the "Bank of New York mortgage.")

{¶9} Bank of New York filed its complaint for foreclosure on its mortgage on March 9, 2009. Named as one of the defendants was Richland Bank.

{¶10} On January 25, 2010, Bank of New York filed its motion for summary judgment in foreclosure against the Zeiglers. Bank of New York filed a separate motion for summary judgment against Richland Bank on the issue of priority. In its motion, Bank of New York argued that the doctrine of equitable subrogation should apply to the issue of priority, thereby giving Bank of New York the first and best lien on the residential property. Richland Bank filed a response and Bank of New York filed a reply.

[1] Richland Bank argues that in the Satisfaction of Mortgage recorded on March 5, 2004, Bank of America, N.A. stated it was the holder and owner of the Society National Bank Mortgage. In 1994, Society National Bank became KeyCorp. In 1995, Bank of America purchased KeyCorp Mortgage, Inc.

{¶11} On April 1, 2010, the trial court granted Bank of New York's motion for summary judgment against the Zeiglers in the amount of $251,568.23 and issued a Decree of Foreclosure.

{¶12} On April 23, 2010, the trial court granted summary judgment in favor of Bank of New York and against Richland Bank on the issue of priority. The trial court found that the doctrine of equitable subrogation applied and Bank of New York held the first and best lien as to only $115,958.34, the amount paid by Regions Bank to pay off the Society National Bank mortgage. The trial court included the Civ.R. 54(B) language that the April 23, 2010 judgment entry was a final, appealable order and there was no just cause for delay.

{¶13} On May 14, 2010, Richland Bank filed a Motion for Partial Stay of Execution requesting that the trial court allow the sale of the residential property to go forward, but the trial court should hold the funds from the proceeds of the sale pending the result of an appeal. The stay of execution was granted.

{¶14} On May 21, 2010, Richland Bank filed a Notice of Appeal of the April 23, 2010 judgment entry. The case was assigned to the accelerated calendar.

{¶15} Richland Bank filed a reply brief on July 22, 2010. Bank of New York filed a motion to strike the reply brief because pursuant to App.R. 11.1, no reply briefs are permitted. We find Bank of New York's argument to be well taken and hereby strike Richland Bank's reply brief.

ASSIGNMENTS OF ERROR

{¶16} Appellant raises two Assignments of Error:

{¶17} "I. THE COURT BELOW ERRED IN GRANTING SUMMARY JUDGMENT WHEN THERE WERE DISPUTES CONCERNING MATERIAL FACTS.

{¶18} "II. THE COURT BELOW ERRED IN APPLYING THE DOCTRINE OF EQUITABLE SUBROGATION WITHOUT CONSIDERING WHETHER DELAY IN REQUESTING SUBROGATION OR AN INCREASE IN THE AMOUNT AND INTEREST RATE OF THE NEW LOAN WOULD BE UNFAIR TO THE HOLDER OF THE JUNIOR MORTGAGE THAT IS NOW FIRST IN TIME."

{¶19} This case comes to us on the accelerated calendar. App. R. 11.1, which governs accelerated calendar cases, provides, in pertinent part:

{¶20} "(E) Determination and judgment on appeal. The appeal will be determined as provided by App. R. 11.1. It shall be sufficient compliance with App. R. 12(A) for the statement of the reason for the court's decision as to each error to be in brief and conclusory form. The decision may be by judgment entry in which case it will not be published in any form."

{¶21} One of the important purposes of accelerated calendar is to enable an appellate court to render a brief and conclusory decision more quickly than in a case on the regular calendar where the briefs, facts and legal issues are more complicated. *Crawford v. Eastland Shopping Mall Assn.* (1983), 11 Ohio App.3d 158, 463 N.E.2d 655.

{¶22} This appeal shall be considered in accordance with the aforementioned rules.

{¶23} We will first address the standard of review applicable to Richland Bank's Assignments of Error. Summary judgment motions are to be resolved in light of the dictates of Civ.R. 56. Said rule was reaffirmed by the Supreme Court of Ohio in *State ex rel. Zimmerman v. Tompkins,* 75 Ohio St.3d 447, 448, 1996-Ohio-211:

{¶24} "Civ.R. 56(C) provides that before summary judgment may be granted, it must be determined that (1) no genuine issue as to any material fact remains to be litigated, (2) the moving party is entitled to judgment as a matter of law, and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing such evidence most strongly in favor of the nonmoving party, that conclusion is adverse to the party against whom the motion for summary judgment is made. *State ex. rel. Parsons v. Fleming* (1994), 68 Ohio St.3d 509, 511, 628 N.E.2d 1377, 1379, citing *Temple v. Wean United, Inc.* (1977), 50 Ohio St.2d 317, 327, 4 O.O3d 466, 472, 364 N.E.2d 267, 274."

{¶25} As an appellate court reviewing summary judgment motions, we must stand in the shoes of the trial court and review summary judgments on the same standard and evidence as the trial court. *Smiddy v. The Wedding Party, Inc.* (1987), 30 Ohio St.3d 35.

II.

{¶26} We will first address Richland Bank's second assignment of error in regards to equitable subrogation because it is dispositive of this matter.

{¶27} Pursuant to R.C. 5301.23(A), mortgages "take effect in the order of their presentation." In the present case, the Society National Bank mortgage was recorded first. The Richland Bank mortgage was recorded next in time. The Bank of New York

mortgage was recorded after that. The Bank of New York mortgage paid off the Society National Bank mortgage making the Richland Bank mortgage first in time. Bank of New York raised the issue of equitable subrogation to argue that the Bank of New York mortgage was first in time.

{¶28} This Court recently reviewed the doctrine of equitable subrogation in *Aurora Loan Servs., LLC v. Molter*, Delaware App. No. 09 CAE 09 0086, 2010-Ohio-3704. We stated,

{¶29} "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." Id. at ¶27.

{¶30} The application of equitable subrogation depends on the facts and circumstances of each case and is largely concerned with the prevention of fraud and relief against mistakes. *Jones*, 61 Ohio St.2d at 102. "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." *Aurora Loan Servs., LLC* at ¶27.

{¶31} The Ohio Supreme Court recently addressed the doctrine of equitable subrogation in *ABN AMRO Mortgage Group., Inc. v. Kangah*, -- Ohio St.3d --, 2010-Ohio-3779, -- N.E.2d --. In the August 19, 2010 decision, the Supreme Court reviewed a case where on July 5, 2000, Kangah, the mortgagor, executed two promissory notes that were secured by a mortgage on his property. The First Ohio Mortgage Corporation ("First Ohio") held the first mortgage for $68,916 and the Cuyahoga County Department of Development ("CCDOD") held the second mortgage for $7,500. The mortgages were recorded on July 12, 2000. First Ohio assigned its mortgage to Countrywide Home Loans, Inc. *Kangah*, at ¶2.

{¶32} A year later, Kangah refinanced his first mortgage through ABN AMRO Mortgage Group. ABN's mortgage was recorded on June 19, 2001, for $77,000. The ABN mortgage paid off the $69,468.60 Countrywide mortgage and also covered $599.05 in outstanding property taxes. The remaining $7,000 was applied to the fees and costs of refinancing. Id. at ¶3.

{¶33} The CCDOD mortgage was not satisfied by the ABN mortgage. ABN's title examiner did not discover the CCDOD mortgage. ABN stated it had constructive knowledge of the CCDOD mortgage. Id.

{¶34} On November 8, 2006, ABN filed for foreclosure. CCDOD filed a cross-claim arguing that it had held the first and best lien on the property. The trial court granted summary judgment in favor of ABN, concluding that ABN was protected by the doctrine of equitable subrogation. Id. at ¶4. The Eighth District Court of Appeals affirmed the decision of the trial court, but also certified that a conflict existed. See *ABN AMRO Mortgage Group, Inc. v. Kangah*, 180 Ohio App.3d 689, 2009-Ohio-359, 906 N.E.2d 1195.

{¶35} The Supreme Court determined that a conflict existed and requested briefing on the following issue:

{¶36} "Whether the doctrine of equitable subrogation applies when a prior lien is satisfied with loan proceeds and (1) the party asserting the doctrine intended to hold the first and best lien, and (2) the competing lienholder had the expectation that its interest would be junior at the time that it received its interest, where the party asserting the doctrine has no actual knowledge of the competing lien due to its mistake or the mistake of a third party." *ABN AMRO Mtge. Group, Inc. v. Kangah,* 121 Ohio St.3d 1471, 2009-Ohio-2045, 905 N.E.2d 652.

{¶37} In determining whether the doctrine of equitable subrogation applied to the facts of *Kangah*, the Supreme Court recited the above-cited law about equitable subrogation. The Supreme Court found that in applying the facts and circumstances of

the specific cases to the doctrine of equitable subrogation, the Supreme Court had considered various factors in the balancing of the equities:

{¶38} "In *Jones,* the negligence of the lender was the only significant factor that this court considered. *Jones,* 61 Ohio St.2d at 103, 15 O.O.3d 132, 399 N.E.2d 1215. In *Deitsch,* the court considered the effect of allowing equitable subrogation and concluded that there, equitable subrogation would not worsen the status of the holder of the second mortgage, in part because the holder of the secondary mortgage would have a cause of action against the borrower. *Deitsch,* 127 Ohio St. at 512, 189 N.E. 440. We stated, 'No greater burden was placed on the [holder of the secondary mortgage] than she would have borne if the old mortgage * * * had not been released.' Id. Similarly, in *Straman,* we emphasized that the general creditors would not be in 'a worse condition than they were before Mr. Brunning loaned his money.' Id., 58 Ohio St. at 454, 51 N.E. 44. We stated that the equitable 'subrogation will add no new burdens to the creditors.' Id." Id. at ¶12.

{¶39} The Supreme Court then applied the principles of equitable subrogation to the facts of *Kangah*. The Court found that the elements of a claim for equitable subrogation were present in that "ABN advanced funds to retire a first mortgage, ABN intended to be secured by a first mortgage, and because of a mistake, the ABN is currently not first in position." Id. at ¶13. The Court concluded, however, that the application of the equities did not favor ABN:

{¶40} "ABN would not be seeking equitable subrogation but for someone's negligence. That circumstance alone was enough to defeat equitable subrogation in *Jones,* 61 Ohio St.2d at 103, 15 O.O.3d 132, 399 N.E.2d 1215. Whether ABN or the

title insurance company it employed was negligent is uncertain. If the title insurance company was negligent, ABN may have a claim against it for its loss, negating its need for equitable subrogation. CCDOD has no claim against ABN or the title insurance company. Furthermore, CCDOD's note with Kangah prohibits it from seeking a judgment against Kangah; ABN's does not.

{¶41} "Significant here is that CCDOD is in a worse position than it would have otherwise been. In July 2000, CCDOD made its loan and was secondary to a mortgage of $68,916. More than six years later, when ABN filed for foreclosure, Kangah owed $71,787.09, plus some accrued interest. Thus, even though Kangah had reduced the balance he owed ABN from $77,000 to $71,787.09, CCDOD's position had not improved, as would have been normal. Rather, its lien was secondary to a larger mortgage than when it had lent Kangah the $7,500. This circumstance is due in large part to the substantial costs associated with closing the ABN mortgage.

{¶42} "We conclude that CCDOD is in a worse position than it would have been if ABN had not extinguished the First Ohio/Countrywide mortgage. Accordingly, the doctrine of equitable subrogation is inapplicable." Id. at ¶14-15. Therefore, the Ohio Supreme Court reversed the decision of the Eighth District Court of Appeals.

{¶43} We will follow the reasoning of *Kangah* in this case. As in *Kangah*, we must first find that the elements of equitable subrogation to be present in this case. Regions Bank/Bank of New York advanced funds to retire a first mortgage. Regions Bank/Bank of New York intended to be secured by a first mortgage, and because of a mistake[2], Bank of New York is currently not first in position.

{¶44} The issue then, pursuant to *Kangah*, is whether Richland Bank is in a worse position than it would have been if the Zeiglers had not refinanced the Society National Bank mortgage with Regions Bank. Bank of New York argues that Richland Bank is in no worse position. We disagree based on the precedent established by *Kangah*.

{¶45} We look to the amounts of the mortgages as prescribed by *Kangah*. On March 17, 1994, Society National Bank executed a mortgage in favor of the Zeiglers in the amount of $146,250. On November 13, 1998, the Zeiglers executed a mortgage in favor of Richland Bank in the amount of $285,000. On November 24, 2003, the Zeiglers refinanced the Society National Bank mortgage by executing an Adjustable Rate Note in the amount of $259,350 in favor of Regions Bank/Bank of New York. At closing, $115,958.34 of the loan proceeds from Regions Bank was used to pay off the Society National Bank mortgage. The Final Judicial Report filed by Bank of New York on March 19, 2009 states that the Zeiglers were liable under the Bank of New York mortgage for $251,568.23.

[2] This Court says "mistake," but in this case, neither party provided any argument or Civ.R. 56 evidence as to Regions Bank/Bank of New York's negligence or actual/constructive knowledge of the Richland Bank mortgage at the time of the refinancing. However, the issue of negligence or mistake is not before us because the parties have not raised this issue on appeal. Nevertheless, this Court has gleaned from the record that the Bank of New York mortgage did not contain any subrogation language requiring that all other liens be subordinate to the mortgage.

{¶46} Bank of New York argues that Richland Bank is in no worse position and suffers no inequities because if the Zeiglers had defaulted on the Society National Bank mortgage in 2003 immediately before the refinancing, Richland Bank would have been second in time to Society National Bank in the amount of $115,958.34. In support of their argument, Bank of New York relies upon *Washington Mut. Bank, FA v. Aultman*, 172 Ohio App.3d 584, 2007-Ohio-3706, 876 N.E.2d 617.

{¶47} In that *Aultman*, the refinancing mortgagee provided a $97,500 loan to the mortgagors to pay off the original $62,234 mortgage. The refinancing mortgagee intended to be the first mortgage and was not aware that there was a second mortgage recorded shortly after the original mortgage. The Second District Court of Appeals found that the refinancing mortgagee was entitled to be first under the doctrine of equitable subrogation. One of its reasons for so holding was that the second mortgagee's position would not change as a result of the subrogation. Id. at ¶42. The court stated, "Caldwell was originally in the second-lien position, and Washington Mutual has sought subrogation only to the extent that it paid off the Peoples Savings Bank mortgage and not to the full amount of its loan. Accordingly, the substitution of Washington Mutual for Peoples Savings Bank, in the amount of $62,234, has no effect on Caldwell's original position."

{¶48} We find that *Kangah* has placed the reasoning of *Aultman* in doubt. When the Eighth District Court of Appeals certified *Kangah* for a conflict, the court found its decision to be consistent with *Aultman* and in conflict with *Alegis Group L.P. v. Lerner,* Delaware App. No. 2004-CAE-05038, 2004-Ohio-6205, 2004 WL 2647607; *Leppo, Inc. v. Kiefer* (Jan. 31, 2001), Summit App. Nos. 20097 and 20105, 2001 WL 81262; and

Assocs. Fin. Servs. Corp. v. Miller, Portage App. No. 2001-P-0046, 2002-Ohio-1610, 2002 WL 519667.

{¶49} In the facts of *Kangah*, the original Countrywide mortgage was for $68,916. The ABN mortgage was for $77,000. A portion of the proceeds of the loan paid off the Countrywide loan in full. At the time of the foreclosure, ABN sought $71,787.09 from Kangah. As opposed to the reasoning in *Aultman*, the Supreme Court in *Kangah* did not separate out the amount of the loan ABN had paid to Countrywide as its subrogation amount to which it was entitled priority. The Supreme Court made no differentiation as to the amount to which ABN claimed priority to. The Supreme Court found that at the time CCDOD made its mortgage, it was secondary to a mortgage of $68,916. At the time of foreclosure it was secondary to a mortgage of $71,787.09. *Kangah*, supra at ¶15.

{¶50} In the present case, at the time Richland Bank made its mortgage to the Zeiglers, it was second to a mortgage in the amount of $146,250. At the time Regions Bank/Bank of New York refinanced the mortgage, Richland Bank was second to a mortgage of $259,350 and at the time of foreclosure, second to a mortgage due and owing in the amount of $251,568.23. We find pursuant to *Kangah*, the position of Richland Bank had not improved and its lien was secondary to a larger mortgage than when it had lent the Zeiglers the $285,000. Therefore, Richland Bank was in a worse position than it would have been if Regions Bank/Bank of New York had not extinguished the Society National Bank mortgage. Accordingly, the doctrine of equitable subrogation is inapplicable to the facts of the present case under the authority of *Kangah*.

{¶51} Richland Bank's second Assignment of Error is sustained.

I.

{¶52} Based on our holding on Richland Bank's second Assignment of Error, we find it unnecessary to address Richland Bank's first Assignment of Error.

{¶53} The judgment of the Richland County Court of Common Pleas is reversed and the case is remanded to the trial court for further proceedings consistent with this opinion and judgment.

By: Delaney, J.

Gwin, P.J. and

Hoffman, J. concur.

HON. PATRICIA A. DELANEY

HON. W. SCOTT GWIN

HON. WILLIAM B. HOFFMAN

PAD:kgb

[Cite as *Bank of New York Mellon Trust Co. v. Zeigler*, 2010-Ohio-4968.]

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FIFTH APPELLATE DISTRICT

THE BANK OF NEW YORK MELLON TRUST COMPANY	:	
Plaintiff-Appellee	:	
-vs-	:	JUDGMENT ENTRY
GEORGE W. ZEIGLER, JR., et al.	:	
	:	Case No. 2010 CA 0065
Defendants-Appellant	:	

For the reasons stated in our accompanying Opinion on file, the judgment of the Richland County Court of Common Pleas is REVERSED AND REMANDED. Costs assessed to Appellee.

HON. PATRICIA A. DELANEY

HON. W. SCOTT GWIN

HON. WILLIAM B. HOFFMAN