

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
HURON COUNTY

The Croghan Colonial Bank

Court of Appeals No. H-13-006

Appellant

Trial Court No. CVE 20090800

v.

Olena Food Farm, Inc., et al.

DECISION AND JUDGMENT

Appellees

Decided: October 11, 2013

* * * * *

Mark R. Tantari and Steven B. Winters, for appellant.

Robert W. Gentzel, for appellee.

* * * * *

SINGER, P.J.

{¶ 1} Appellant, The Croghan Colonial Bank (hereinafter the “Bank”) appeals from the April 11, 2013 judgment of the Huron County Court of Common Pleas confirming a foreclosure sale and holding that the Bank’s erroneously-released lien was secondary to an intervening lien filed by appellees, Stephen J. Cassidy, Jr. and Barbara

Cassidy. Because we find the trial court did not err in determining the priority of the liens, we affirm.

ASSIGNMENT OF ERROR NO. 1

THE TRIAL COURT ERRED BY RULING APPELLEES' MORTGAGE HAD PRIORITY OVER APPELLANT'S REINSTATED MORTGAGE ATTACHING TO THE PROPERTY THAT IS THE SUBJECT OF THE PRESENT ACTION.

ASSIGNMENT OF ERROR NO. 2

THE TRIAL COURT ERRED APPLYING A NEGLIGENCE STANDARD IN RULING THAT APPELLANT MAY NOT REINSTATE ITS MISTAKENLY RELEASED MORTGAGE AT THE EXPENSE OF ANY INTERVENING LIENHOLDER.

ASSIGNMENT OF ERROR NO. 3

THE TRIAL COURT ERRORED [sic] BY IGNORING EVIDENCE AND FAILING TO RECOGNIZE THAT APPELLEES' MORTGAGE SECURED A PRE-EXISTING DEBT, WHICH WAS INCURRED PRIOR TO THE MISTAKEN RELEASE OF APPELLANT'S MORTGAGE.

{¶ 2} On August 25, 2009, the Bank filed its complaint for judgment on a cognovit note executed on September 22, 2005, and foreclosure of the mortgage securing the note, which was recorded October 5, 2005. Appellees, along with Olena Food Farm, Inc.,

Raymond E. Missey, Maureen G. Missey, Gary D. Baughman, Marjorie K. Baughman, and the Huron County Treasurer, were named as defendants.

{¶ 3} Olena Food Farm, Inc. immediately filed its answer confessing judgment and the court granted judgment to the Bank on the note, awarding the Bank \$237,563.48, plus interest. Appellees, the Cassidys, filed their answer and cross-claim on October 26, 2009, asserting that the Misseys had executed and delivered to the Cassidys on July 1, 2009, a promissory note for \$32,157.69, which was secured by a mortgage executed on July 1, 2009 and recorded July 2, 2009. The Cassidys alleged that the Misseys are in default on the note and the Cassidys declared the note immediately due and payable. Furthermore, the Cassidys sought a judgment in their favor on the note and foreclosure of their mortgage, as well as a declaration that their mortgage was a valid first and best lien against the property after payment of the property taxes.

{¶ 4} During the course of the litigation, the Cassidys asserted that their mortgage should be given first priority status because the Bank's mortgage lien had been released on April 13, 2009 and was never re-recorded. After the Cassidys' mortgage lien was recorded, the Bank recorded an "affidavit for reinstatement and notice of mortgage released in error." The Cassidys asserted that there is no special provision under Ohio law for reinstatement of an improperly released mortgage by affidavit. Therefore, the Cassidys argued that their mortgage takes precedence. Ultimately, the trial court determined that the affidavit reinstated the Bank's mortgage lien.

{¶ 5} Following cross-motions for summary judgment, on August 24, 2012, the trial approved and confirmed the sale of the property for \$83,334. After deducting the cost of the action and distributing a portion of the proceeds to the treasurer and auditor of Huron County, the court deposited with the clerk \$68,485.50 for distribution to one of the parties upon resolution of the issue of the priority of liens. Both parties moved for summary judgment on this issue.

{¶ 6} In its final judgment entry dated April 11, 2013, the court found that the release of the mortgage was the result of negligence on the part of the Bank and while the bank was entitled to reinstatement of its mortgage, it could not do so at the expense of an intervening lienholder. Therefore, since the Cassidys' note and mortgage were filed before the Bank reinstated its mortgage, the Cassidys' lien had first priority. The proceeds of the sale were ordered to be distributed to first satisfy the Cassidys' mortgage lien and then the Bank's mortgage lien. The Bank sought an appeal to this court.

{¶ 7} In its first assignment of error, the Bank argues that the trial court erred by holding that the Cassidys had priority over the Bank's lien. In its second assignment of error, the Bank argues that the trial court erred by applying a negligence standard when determining whether the Bank's mortgage lien should be reinstated. In its third assignment of error, the Bank argues that the trial court's decision was contrary to the manifest weight of the evidence because it ignored the fact that the mortgage secured a pre-existing debt. We will address all of these assignments of error together.

{¶ 8} It is undisputed that the Bank's mortgage lien was recorded first and, except for the mistaken release, would have clearly had first priority. However, during the time period between the erroneous release of the Bank's mortgage and the filing of an affidavit with the intent to reinstate the mortgage lien, the Cassidys' mortgage lien was recorded.

{¶ 9} The Bank asserts that a mistakenly-released mortgage can be reinstated by the recording of an affidavit pursuant to R.C. 5301.252 (recording of affidavit to evidence facts affecting title to real estate), 5301.44 (reformation of an instrument), and 2719.01 (reformation of instruments to conform to the intent of the parties). We need not reach the issue of whether the affidavit could properly reinstate the mortgage lien because the trial court recognized the reinstatement of the mortgage lien by affidavit and that determination has not been challenged on appeal. The only issue on appeal is whether the trial court erred in holding that the Cassidys' lien had priority over the Bank's lien.

{¶ 10} The Bank argues that the reinstatement of its lien revives the lien and its priority relates back to the date the mortgage lien was initially recorded. The Bank further argues that the Cassidys are not intervening lienholders because they testified during their deposition that they neither relied on the public record nor changed their position as result of the public record, and they learned of the Bank's lien only after the Bank filed the foreclosure action.

{¶ 11} The Cassidys argue that the recording of their mortgage secured their lien as of the date of the recording and, therefore it ranked higher in priority than the Bank's lien as a matter of law. R.C. 5301.23. We agree.

{¶ 12} The filing of an affidavit pursuant to R.C. 5301.252 did not revive the Bank's priority over an intervening lienholder as a matter of law. The Bank needed to seek an equitable reinstatement of its lien to its first priority status and subordination of the intervening lien. *First Nat. Bank of Pennsylvania v. Pollock Inn Restoration Assn.*, 7th Dist. Mahoning No. 96 CA 98, 1999 WL 436721, *3 (June 22, 1999); *TransAmerica Fin. Services v. Stiver*, 61 Ohio App.3d 49, 51, 572 N.E.2d 149 (2d Dist.1989); *Farmers Sav. & Loan Co. v. Kline*, 92 Ohio App. 406, 409, 109 N.E.2d 525 (7th Dist.1951); and *Commercial Bldg. & Loan Co. v. Foley*, 25 Ohio App. 402, 405, 158 N.E. 236 (4th Dist.1927).

{¶ 13} In cases where a first-priority lien was erroneously released by a recorder or third party, courts have generally applied equitable principles to reinstate the priority of the first lien recorded. *Kline, supra* (court set aside recorder's mistakenly-recorded cancellation of mortgage where defendant would not be damaged); *Foley, supra* (the great weight of authority supported the right of first lienholder to have its lien reinstated after recorder erroneously released it, even though a subsequent bona fide purchaser had no notice or knowledge of the erroneously-released first lien); and *In re Estate of Wells*, 4th Dist. Adams No. 444, 1987 WL 13949, *3 (July 1, 1987) (reinstatement would have been appropriate except that the doctrine of laches applied).

{¶ 14} The same analysis has been applied to mistaken releases by the lender where no intervening interest was obtained. *Pollock Inn, supra* (equitable reinstatement of first mortgage permitted after the lender mistakenly filed a satisfaction of the mortgage

because the second mortgage specifically acknowledged the priority of the first mortgage and there was no harm caused by equitable reinstatement).

{¶ 15} But, when there has been an intervening interest recorded, courts have ordered equitable reinstatement of the first lien and its priority only when the intervening lienholder had actual or constructive notice of the first lien and either did not detrimentally rely upon the erroneous release or were not prejudiced by revival of the first lien. *Fifth Third Mtge. Co. v. Fillmore*, 5th Dist. Delaware No. 12 CAE 04 0030, 2013-Ohio-312, ¶ 53 (generally “equity follows the law,” but if the rights of the parties are not clearly delineated, application of “broad equitable principles of fairness” is appropriate) and *Interstate Adviser, LLC McCalla*, Conn.Super.Ct. No. HHDCV106014396S, 2012 WL 5860389, *4 (a “court should not in equity permit a lienor, who has not been prejudiced thereby, to acquire priority when that was not the intent of the parties.”).

{¶ 16} We conclude that the Bank’s equitable reinstatement remedy must be based on the strength of its equitable position rather than on the equitable position of the intervening lienholder who has priority as a matter of law. *Accord Green Tree Servicing, LLC v. U.S.*, 783 F.Supp.2d 243, 253 (D.C.N.H.2011). In reviewing the trial court’s determination of whether an equitable remedy was appropriate, the appellate court’s review is limited to whether the trial court abused its discretion. *Sandusky Properties v. Aveni*, 15 Ohio St.3d 273, 274-275, 473 N.E.2d 798 (1984) and *Fine v. U.S. Erie Islands Co., Ltd.*, 6th Dist. Ottawa No. OT-07-048, 2009-Ohio-1531, ¶ 30.

{¶ 17} The Cassidys testified that they intended to assist their daughter and son-in-law, the Misseys, in 2004, so that they could obtain a loan of approximately \$32,000 to make an addition to their business property. The Cassidys allowed their bank account at the Bank (Croghan Colonial Bank) to be used as collateral for the Bank to give a loan to the Misseys. The Bank assisted in the loan process and the drafting of a promissory note, which the Cassidys testified Raymond Missey signed. The Cassidys testified that the Bank was aware the money was being lent to their son-in-law for his business because it gave the money directly to him. In 2005, the Bank also loaned the Misseys money and secured their note by the recording of a mortgage lien.

{¶ 18} The Misseys had paid off half of the 2004 loan by 2008, but borrowed additional money in 2008 because business was slow (thereby increasing their loan to roughly \$32,000 again). The Cassidys testified they again went to the Bank where all of the documentation was generated and Raymond Missey executed the promissory note and was shown as the borrower. Shortly thereafter, in April 2009, the Bank erroneously released its 2005 mortgage lien.

{¶ 19} In late 2008, Raymond Missey told the Cassidys that the Misseys would not be able to make the December 2008 loan payment. The Cassidys intended to make a couple of payments to help the Misseys. After a conversation with the manager at the Bank in December 2008, the Cassidys decided to pay off in full the loan secured by their bank account because the business was not profitable and the Cassidys had been convinced by the Bank manager that they would ruin their credit rating with late

payments. The Cassidys testified that repayment of the loan was not intended to be a gift to the Misseys, but the Cassidys were willing to allow the Misseys to pay off the loan as they were able.

{¶ 20} Afterward, without consulting the Misseys, the Cassidys decided to seek legal advice. Their counsel drafted a note for \$32,157.69 and mortgage to protect the Cassidys in the event that the Misseys denied owing money to the Cassidys. Their lawyer sent the documents to the Misseys for execution on July 1, 2009, and the lien was recorded on July 9, 2009. At that time, the Cassidys did not know that the Bank had previously recorded a mortgage on the Misseys' property or that the Bank had erroneously released the mortgage. The Cassidys did not learn of the mortgage or its release until after the foreclosure action was filed.

{¶ 21} Jerry Geary, Senior Vice President of the Bank testified at his deposition that the process of canceling mortgages and showing the paid-off loans did not fall under his jurisdiction, but he was responsible for signing the final release of the mortgage which was filed with the recorder. There were documents in the record, however, that described a lengthy process used by the Bank to verify the release of a mortgage lien. The process did not, however, require Geary to do any independent verification before filing the release as he signed three or four releases a day. After learning of the erroneous release, Geary did not investigate why the release had been prepared. There is nothing on the release itself which would indicate who had prepared it or why it was prepared.

Geary was told of the error and informed that measures were being taken to correct the error.

{¶ 22} Thomas Elder, Chief Lending Officer for the Bank, testified at his deposition that when the Bank realized their mortgage had been erroneously released, he sought legal advice and the affidavit was filed as a result of that advice.

{¶ 23} Upon a review of all of the evidence, we find that the trial court's finding that the Bank's release of the mortgage was due to its own error is supported by the evidence. The trial court's use of the word "negligence" was not intended to imply a negligence standard. Rather, it was used solely in a generic sense to convey that the Bank was responsible for its error.

{¶ 24} While the Cassidys did not rely upon a clear record when they filed their mortgage lien, they certainly relied upon the recording system to assure that their lien would have priority as of July 9, 2009. There was also no evidence presented that the Cassidys were aware of the Misseys' debt to the Bank at the time the Cassidys permitted their bank account to be used as collateral for a second loan of additional funds to the Misseys in 2008. But, there was evidence that the Bank was aware of all of the loans. Finally, the issue of equity requires us to focus on the Bank's position and not the knowledge or actions of the Cassidys.

{¶ 25} While the Bank asserts that it has a pre-existing debt, their argument fails to recognize that the first loan in 2004 pre-existed the Bank's 2005 loan. Because of the

Cassidys' bank account serving as collateral, there was no need to record a lien on the property. Therefore, the date of the loans is not determinative of the equity issue.

{¶ 26} We find the Bank has failed to demonstrate that the trial court abused its discretion when it found that the Cassidys' mortgage lien had first priority. Appellant's three assignments of error are not well-taken.

{¶ 27} Having found that the trial court did not commit error prejudicial to appellant, the judgment of the Huron County Court of Common Pleas is affirmed. Appellant is ordered to pay the court costs of this appeal pursuant to App.R. 24.

Judgment affirmed.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. *See also* 6th Dist.Loc.App.R. 4.

Arlene Singer, P.J.

JUDGE

Thomas J. Osowik, J.

JUDGE

James D. Jensen, J.
CONCUR.

JUDGE

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at:
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