[Cite as *TCIF REO GCM, L.L.C. v. Natl. City Bank*, 2009-Ohio-4040.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 92447

TCIF REO GCM, LLC

PLAINTIFF-APPELLANT

vs.

NATIONAL CITY BANK, ET AL.

DEFENDANTS-APPELLEES

JUDGMENT:
REVERSED IN PART AND REMANDED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-606685

BEFORE: Rocco, J., Cooney, A.J., and Kilbane, J.

RELEASED: August 13, 2009

JOURNALIZED:

ATTORNEYS FOR APPELLANT

Max E. Dehn
Michael C. Cohan
Cavitch, Familo, Durkin & Frutkin Co., L.P.A.
The East Ohio Building, 14th Floor
1717 East Ninth Street
Cleveland, Ohio 44114

ATTORNEY FOR APPELLEE NATIONAL CITY BANK

Michael F. Schmitz
Weltman, Weinberg & Reis Co., L.P.A.
Lakeside Place, Suite 200
323 West Lakeside Avenue
Cleveland, Ohio 44113

APPELLEE LAURA L. PATAKY, AKA SHEETS, AKA GIBBONS

Laura L. Pataky, aka Sheets, aka Gibbons
17211 Clifton Boulevard
Lakewood, Ohio 44107

APPELLEE UNKNOWN SPOUSE OF LAURA L. PATAKY, AKA SHEETS, AKA GIBBONS

Unknown spouse of Laura L. Pataky, aka Sheets, aka Gibbons
17211 Clifton Boulevard
Lakewood, Ohio 44107

Continued . . .

APPELLEE UNKNOWN TENANTS, IF ANY, OF LAURA L. PATAKY, AKA SHEETS, AKA GIBBONS

Unknown Tenants, if any, of Laura L. Pataky, aka Sheets, aka Gibbons
14945 Lakewood Heights Blvd.
Lakewood, Ohio 44107

N.B. This entry is an announcement of the court's decision. See App.R. 22(B) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(C) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(C). See, also, S.Ct. Prac.R. II, Section 2(A)(1).

KENNETH A. ROCCO, J.:

{¶ 1} Plaintiff-appellant, TCIF REO GCM, LLC ("TCIF"), appeals from a common pleas court order granting summary judgment in favor of defendant-appellee, National City Bank, and determining that National City Bank has the first and best lien on the subject property after real estate taxes. TCIF asserts that the magistrate's findings of fact were not supported by the evidence in the record, the magistrate's decision improperly granted summary judgment to National City Bank, and the court erred by adopting the magistrate's decision. We find that under the doctrine of equitable subrogation, TCIF was entitled to priority over National City Bank to the extent that its loan satisfied a mortgage that had had priority over National City Bank's. Therefore, we reverse the trial court's ruling in part and remand for further proceedings.

Procedural History

{¶ 2} TCIF filed its complaint for foreclosure on November 9, 2006 and amended it on November 20, 2006. The amended complaint named as defendants the property owner, Laura L. Pataky, and her unknown spouse and tenants, if any, as well as National City Bank. The amended complaint alleged that Pataky had executed a promissory note and mortgage in favor of Countrywide Home Loans on October 26, 1999, which TCIF claimed to

have been assigned to it. TCIF asserted that Pataky was in default on the note, and as a result, TCIF had accelerated the debt and now sought judgment on the debt and foreclosure upon the mortgage. It further sought to require National City Bank to "set up [its] liens or interest in the property or be forever barred from asserting such liens or interests."

{¶ 3} National City Bank answered, counterclaimed, and cross-claimed, asserting that it was the holder of a mortgage executed and recorded prior to TCIF's and therefore it had the first and best lien. None of the other defendants answered.

{¶ 4} On December 7, 2007, TCIF moved for partial summary judgment on the issue of equitable subrogation. The exhibits referenced in TCIF's motion[1] were neither attached to the motion nor separately filed at a later date. However, at least some of these documents appear to have been attached to National City Bank's motion for summary judgment on the issue of priority, which was also filed on December 7, 2007.

{¶ 5} The evidence showed that Laura Pataky was the owner of the property at issue in this case, which is located at 14945 Lakewood Heights Boulevard, Lakewood, Ohio. American Midwest Mortgage Corporation

[1]The referenced exhibits included a copy of the amended complaint, a payoff statement from Leader Mortgage Company to True Title, joint stipulations executed by the parties, a copy of the mortgage granted by Pataky to National City Bank, a loan payoff statement from Leader Mortgage, and a letter from Leesa Mingus to Melissa Rainey.

recorded a mortgage in the amount of $66,200 on the subject property on December 30, 1992. This mortgage was ultimately assigned to Leader Mortgage. National City Bank recorded a mortgage on January 28, 1999 for a revolving line of credit in the amount of $35,000.

{¶ 6} On October 29, 1999, Countrywide Home Loans, Inc. recorded a mortgage in the amount of $86,625. Leader Mortgage was paid from the proceeds of this transaction and filed a satisfaction of its mortgage on November 26, 1999. The then-existing balance of $25,014.90 on the National City Bank mortgage (including an early termination fee of $250) was also paid from the proceeds of the Countrywide mortgage. National City Bank's correspondence to the title agent handling the transaction stated that "[i]f the account is to be closed and the lien released on the property (if property secured), the customer must sign the enclosed 'Customer Authorization to Close Account' form and return it to us with your check to the above address." It does not appear that this authorization was ever executed and returned to National City Bank. National City Bank asserts that the mortgagee continued to borrow on the open line of credit, and defaulted on the outstanding balance.

{¶ 7} The magistrate issued a decision granting National City Bank's motion for summary judgment and denying TCIF's motion for partial summary judgment. The magistrate concluded National City Bank's

first-recorded mortgage had priority over TCIF's mortgage under statute, and that TCIF had failed to demonstrate that it should have priority under the doctrine of equitable subrogation. The magistrate noted that "[e]quitable subrogation is generally not permitted where the party seeking subrogation or its agent was aware of the prior superior lien and failed to take the necessary steps to obtain the release or subordination of the lien." While noting the "windfall benefit" to the intervening lienholder who finds itself in a better position than it originally bargained for, the magistrate found no injustice in this benefit because the party seeking subrogation could have avoided the predicament.

{¶ 8} TCIF objected to the magistrate's decision, asserting that (1) the magistrate incorrectly applied the doctrine of equitable subrogation, and (2) the magistrate incorrectly assumed that the title agency who handled the transaction was aware that NCB's line of credit remained open and failed to take steps to close it. The court overruled TCIF's objections and adopted the magistrate's decision, overruling TCIF's motion for partial summary judgment and granting National City Bank's. The court determined that National City Bank had the first and best lien on the subject property after real estate taxes. The court further ordered TCIF to submit a supplemental final judicial report and a proposed magistrate's decision concerning its claim for foreclosure on or before December 1, 2008.

{¶ 9} This appeal followed.

Law and Analysis

{¶ 10} Initially, we must determine whether the order from which TCIF appeals is a final appealable order. The order expressly states that it is "partial." It contemplates further proceedings to complete the foreclosure and sale of the property and determine the amounts due to TCIF and National City Bank.

{¶ 11} The Ohio Supreme Court's decision in *Queen City S. & L. Co. v. Foley* (1960), 170 Ohio St. 383 informs our decision, although it is not conclusive. In *Queen City*, the mortgagee filed a foreclosure action in which it named a lienholder as a party. The lienholder did not file an answer. The mortgagee obtained a judgment and decree of sale in which the court determined that the mortgage was the first and best lien on the property. The lienholder then filed an answer and obtained an order finding that it also had a valid and subsisting lien, but that this lien was second in priority to the mortgagee. The supreme court determined that the lienholder's appeal concerning the priority of its lien was untimely because the first order had already determined that the mortgagee had priority over the lienholder, and the lienholder should have appealed from that order.

{¶ 12} The holding of *Queen City* is somewhat broader than the facts of the case require. The court held: "In a mortgage foreclosure action, a

journalized order determining that the mortgage constitutes the first and best lien upon the subject real estate is a judgment or final order from which an appeal may be perfected." Id. at paragraph one of the syllabus.

{¶ 13} Since *Queen City*, appellate decisions have varied on the question whether an order determining the priority of liens, but not ordering foreclosure and sale, is final and appealable. Some appellate courts have found that an order determining the priority of liens is final and appealable, even if the court has not yet ordered foreclosure or sale of the property. See *Washington Mut. Bank v. Loveland*, Franklin App. No. 04AP-920, 2005-Ohio-1542, ¶6; *Bank One, NA v. Jude*, Franklin App. No. 02AP-1268, 2003-Ohio-3343, ¶16; cf. *St. Clair Sav. v. Janson* (1974), 40 Ohio App.2d 211. Others have concluded that an order declaring the priority of liens but not ordering foreclosure and sale does not resolve all of the issues involved in the action or any separate claim, and therefore is not final and appealable. *Mtge. Electronic Registration Sys., Inc. v. Aleksin*, Summit App. No. 23723, 2007-Ohio-6295, ¶9; *Ameriquest Mtge. Co. v. Middlebrooks*, Lucas App. No. L-06-1006, 2007-Ohio-93.

{¶ 14} Pursuant to Rule 1(B)(2) of the Supreme Court Rules for the Reporting of Opinions, the syllabus of the supreme court's opinion in *Queen City* is controlling over the text or footnotes, where there is disharmony. Although we could distinguish this case from the facts of *Queen City* on the

ground that the court here has not ordered foreclosure or sale of the subject property, Rule 1(B)(2) compels us to hold that the determination that National City Bank's mortgage has priority over TCIF's is a final appealable order.

{¶ 15} We review de novo the common pleas court's order granting summary judgment in favor of National City Bank, applying the same standard of review the trial court used. "Pursuant to Civ.R. 56, summary judgment is appropriate when (1) there is no genuine issue of material fact, (2) the moving party is entitled to judgment as a matter of law, and (3) reasonable minds can come to but one conclusion and that conclusion is adverse to the non-moving party, said party being entitled to have the evidence construed most strongly in his favor." *Zivich v. Mentor Soccer Club, Inc.*, 82 Ohio St.3d 367, 369, 1998-Ohio-389. The scope and standard of our review makes it unnecessary for us to consider whether the magistrate may have made a factual finding unsupported by the evidence in the record, or an erroneous legal ruling. Therefore the first and second assignments of error are overruled. We consider only whether the common pleas court erred by granting summary judgment for National City Bank, applying a de novo standard of review.

{¶ 16} TCIF asserts that the doctrine of equitable subrogation should have allowed it to take priority over National City, because its loan proceeds

were used both to satisfy Leader Mortgage's mortgage and to pay the balance then due to National City Bank on its revolving credit account and mortgage.

TCIF argues that its knowledge of the existence of National City's mortgage, and its failure to obtain a discharge of that mortgage, were not relevant to its subrogation rights because National City Bank was not misled or injured by this alleged negligence.

{¶ 17} R.C. 5301.23 sets forth the general rule that the first mortgage presented and recorded has preference over subsequently presented and recorded mortgages. As between TCIF and National City Bank, National City Bank has the first recorded mortgage and therefore has priority under this statute.

{¶ 18} The doctrine of equitable subrogation can overcome the general statutory rule, however. Under the doctrine of equitable subrogation, "[a] third person who, with his own funds, satisfies and discharges a prior first mortgage on real estate, upon the express agreement with the owner of the real estate that he will be secured by a first mortgage on the real estate in question, is subrogated to all the rights of the first mortgagee in such real estate." *Fed. Union Life Ins. Co. v. Deitsch* (1934), 127 Ohio St. 505, paragraph one of the syllabus. Furthermore, "[t]he fact that such subrogation gives the third party a preference over a prior intervening mortgagee, who had no knowledge of such agreement, in no wise affects the

application of the doctrine of subrogation, when the burdens of such prior intervening mortgagee are in no wise increased." Id. at paragraph two of the syllabus.

{¶ 19} Countrywide satisfied the first mortgage on this property, which was held by Leader Mortgage, presumably with the intention of taking the priority of that mortgage.[2] Since National City's mortgage was already subject to Leader Mortgage's prior lien, it is not harmed by giving Countrywide's assignee, TCIF, priority to this extent.

{¶ 20} However, Countrywide's full payment of the then-existing balance on the National City Bank mortgage did not have the same effect. That mortgage secured an open line of credit. The line of credit was not closed. The mortgage was not satisfied, nor did Countrywide obtain a subordination agreement from National City Bank. Regardless of Countrywide's intentions, Countrywide failed to take the actions necessary to ensure its priority over National City Bank with respect to future draws on the line of credit. The equities do not favor granting Countrywide priority to the extent that it paid the then-existing debt on National City's line of credit. Cf. *Bank of New York v. Fifth Third Bank of Central Ohio*, Delaware App. No.

---

[2]This fact distinguishes this case from *Wells Fargo Bank, NA v. Dupler*, Perry App. No. 06 CA 26, 2007-Ohio-3497. In *Dupler*, the party seeking priority did nothing to ensure that either of the two prior mortgages (both held by the same entity) were cancelled. Here, the Leader Mortgage mortgage was satisfied directly from the Countrywide loan proceeds, as part of the loan transaction.

01 CAE 03005, 2002-Ohio-352; *Huntington Natl. Bank v. McCallister* (Feb. 18, 1997), Butler App. No. CA96-07-144.

{¶ 21} We reverse the trial court's judgment in part. We hold that TCIF's mortgage has priority over National City Bank's mortgage, but only to the extent that the TCIF mortgage satisfied the Leader Mortgage mortgage. National City Bank's mortgage is otherwise prior to the remainder that may be due TCIF's mortgage. We remand for further proceedings consistent with this opinion.

Reversed in part and remanded.

It is ordered that appellant recover from appellee costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

KENNETH A. ROCCO, JUDGE

MARY EILEEN KILBANE, J., CONCURS
COLLEEN CONWAY COONEY, A.J.,
CONCURS IN JUDGMENT ONLY