[Cite as *HSBC Mtge. Servs., Inc. v. Raschke*, 2010-Ohio-2997.]

STATE OF OHIO	)	IN THE COURT OF APPEALS
	)ss:	NINTH JUDICIAL DISTRICT
COUNTY OF SUMMIT	)	

HSBC MORTGAGE SERVICES, INC.	C.A. No. 25140
Appellant	
v.	APPEAL FROM JUDGMENT ENTERED IN THE
MATHIAS H. RASCHKE, et al.	COURT OF COMMON PLEAS COUNTY OF SUMMIT, OHIO
Appellees	CASE No. CV-2008-02-1801

DECISION AND JOURNAL ENTRY

Dated: June 30, 2010

WHITMORE, Judge.

{¶1} Plaintiff-Appellant, HSBC Mortgage Services, Inc. ("HSBC"), appeals from the decision of the Summit County Court of Common Pleas granting summary judgment in favor of Defendant-Appellee, Raschke Engraving, Inc. ("Raschke Engraving"). This Court affirms.

I

{¶2} The parties do not dispute the majority of the facts underlying this case. On November 30, 2001, Raschke Engraving obtained a judgment against Mathias and Teresa Raschke in the amount of $24,500 plus 10% interest from that date. On September 3, 2002, Raschke Engraving filed its certificate of judgment, thereby placing a lien upon the real property that Mathias and Teresa owned, located at 4260 Conestoga Trail in Copley, Ohio. The judgment lien was filed after the couple had already encumbered the property

with two mortgages: a first mortgage of approximately $153,077 held with Union Federal Bank and a second mortgage held with First Merit Bank in the amount of $44,043. Both mortgages were executed in early 2002, before Raschke Engraving had filed its judgment lien in September 2002.

{¶3} In late 2004, Mathias and Teresa executed an adjustable rate note on the property with Intervale Mortgage Corporation ("Intervale") in the amount of $215,885. Mortgage Electronics Registration Systems, Inc. ("MERS") held the mortgage as the nominee on Intervale's note. MERS properly recorded its mortgage on the property on January 6, 2005. The note executed in 2004 was used to pay off the two mortgages Mathias and Teresa held on the property since early 2002. None of the proceeds from the Intervale note were used to satisfy Raschke Engraving's judgment lien. MERS's mortgage was later assigned to HSBC in December 2007. The foregoing transaction is collectively termed "HSBC's mortgage."

{¶4} Mathias and Teresa defaulted on the payment of their mortgage, so in February 2007, HSBC initiated a foreclosure proceeding. HSBC later amended its complaint to add two other defendants with an interest in the proceeding, namely Raschke Engraving and Plymouth Park Tax Services, LLC, both of whom held liens against the property. At that point in time, Mathias and Teresa had filed for bankruptcy protection under Chapter 13 of the Bankruptcy Code. Accordingly, Raschke Engraving sought relief from the automatic stay imposed by the bankruptcy filing. Thereafter, Raschke Engraving answered the complaint and filed a cross-claim against HSBC and a counterclaim against the remaining defendants asserting that it held a valid lien against

the property which pre-dated the recording of HSBC's mortgage or the tax lien of Plymouth Park Tax Services, LLC.

{¶5} HSBC filed a second amended complaint to assert a claim for equitable subrogation against Raschke Engraving. The count alleged that HSBC's mortgage was secured as a repayment of the first and second mortgages held by Union Federal Bank and First Merit Bank respectively, which had priority over the judgment lien filed later in time by Raschke Engraving. HSBC asserted that, because the proceeds of its loan were used to satisfy the loans with priority over Raschke Engraving's lien, HSBC's mortgage should be considered the first and best lien on the property and Raschke Engraving's judicial lien should be equitably subrogated to the mortgage owed to HSBC.

{¶6} The parties filed cross-motions for summary judgment on the matter, each asserting that it held the first and best lien on the property. The trial court granted Raschke Engraving's motion for summary judgment and denied HSBC's motion for the same. The court concluded that equitable subrogation was unwarranted in the matter and assigned Raschke Engraving's lien priority over HSBC's mortgage because it was recorded earlier in time. HSBC appeals from the trial court's judgment and asserts one assignment of error for our review.

II

Assignment of Error

> "THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION FOR SUMMARY JUDGMENT AND GRANTING THE MOTION FOR SUMMARY JUDGMENT OF DEFENDANT-APPELLEE RASCHKE ENGRAVING, INC."

{¶7} In its sole assignment of error, HSBC argues that the trial court erred as a matter of law in granting Raschke Engraving's motion for summary judgment because HSBC had the first and best lien on the property and Raschke Engraving's lien should have been equitably subrogated to that of HSBC's. We disagree.

{¶8} An appellate court reviews an award of summary judgment de novo. *Grafton v. Ohio Edison Co.* (1996), 77 Ohio St.3d 102, 105. It applies the same standard as the trial court, viewing the facts of the case in the light most favorable to the non-moving party and resolving any doubt in favor of the non-moving party. *Viock v. Stowe-Woodward Co.* (1983), 13 Ohio App.3d 7, 12. Summary judgment is proper under Civ.R. 56(C) if:

> "(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 the favor of the party against whom the motion for summary judgment is made, that conclusion is adverse to that party." *Temple v. Wean United, Inc.* (1977), 50 Ohio St.2d 317, 327.

The party moving for summary judgment bears the initial burden of informing the trial court of the basis for the motion and pointing to parts of the record that show the absence of a genuine issue of material fact. *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 292-93. Specifically, the moving party must support its motion by pointing to some evidence in the record of the type listed in Civ.R. 56(C). Id. Once this burden is satisfied, the non-moving party bears the burden of offering specific facts to show a genuine issue for trial. Id. at 293; Civ.R. 56(E).

{¶9} R.C. 5301.23 establishes the general rule that the first mortgage recorded shall have priority over any later recorded mortgage. R.C. 5301.23(A) ("The first mortgage presented shall be the first recorded, and the first mortgage recorded shall have preference."). In certain circumstances, however, the doctrine of subrogation defeats this general statutory rule. See, e.g., *First Union Natl. Bank v. Harmon*, 10th Dist. No. 02AP-77, 2002-Ohio-4446, at ¶17. "The doctrine of subrogation incorporates both conventional subrogation and legal (or equitable) subrogation. Conventional subrogation is premised on the contractual obligations of the parties, either express or implied." *State v. Jones* (1980), 61 Ohio St.2d 99, 102. Equitable subrogation, on the other hand, "arises by operation of law when one having a liability or right *** 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, quoting *Federal Union Life Ins. Co. v. Deitsch* (1934), 127 Ohio St. 505, 510. Generally, the principles of equitable subrogation are invoked to prevent unjust enrichment. *State Savings Bank v. Gunther* (1998), 127 Ohio App.3d 338, 346. Equitable subrogation also applies to prevent fraud and to provide relief from mistakes, however, "the right to it depends on the facts and circumstances of each particular case." *Jones*, 61 Ohio St.2d at 102, quoting *Canton Morris Plan Bank v. Most* (1932), 44 Ohio App. 180, 184. "In order to entitle one to subrogation, his equity must be strong and his case clear." *Jones*, 61 Ohio St.2d at 102.

{¶10} In its summary judgment motion, Raschke Engraving asserted that it held a valid and subsisting first lien upon the real property that is the subject of HSBC's

foreclosure action and, consequently, summary judgment should be granted in its favor as there is no genuine issue of material fact that remains in dispute as to its status as the priority lienholder over the later-recorded interest of HSBC. In support of its motion, Raschke Engraving appended affidavits with exhibits which establish that it had obtained a judgment against Mathias and Teresa's property in November 2001, properly recorded that judgment as a lien on the property in September 2002, and renewed the lien in June 2007, pursuant to statute. See R.C. 2329.07(A)(1) (providing that a "judgment shall be dormant and shall not operate as a lien upon the estate of the judgment debtor" after a period of five years from certain specified events). In March 2008, Mathias and Teresa filed for protection under Chapter 13 of the Bankruptcy Code, so upon requesting, and receiving, relief from the automatic stay imposed by the bankruptcy filing, Raschke Engraving filed a new certificate of judgment in June 2008. Based on the foregoing facts, Raschke asserts that it had a valid judgment lien on the property at all times since it created the lien in September 2002, well in advance of HSBC recording its mortgage interest in January 2005.

{¶11} Raschke Engraving further argued in its summary judgment motion that HSBC was not entitled to equitable subrogation because that remedy is inappropriate where a party was in the best position to protect its own interest or was negligent with respect to the transaction. Raschke Engraving appended an affidavit from Attorney James Stimler, in which he attested that, after recording the initial lien for Raschke Engraving in September 2002, American Title Solutions, Inc. ("American Title") contacted him by phone on December 23, 2004, as to the lien's status. Stimler informed

the representative from American Title at that time that the lien was still valid and remained unpaid. Stimler followed up this conversation by sending written correspondence to American Title the same day. The letter, appended to his affidavit, confirmed the existence of Raschke Engraving's lien and the fact that it remained outstanding. Stimler contacted the American Title representative in early January 2005, indicating he had not yet received the lien payment, consistent with American Title's representation to him days earlier. Stimler attested that the American Title representative told him that the loan had closed in December 2004 without any payment having been issued to Raschke Engraving. Upon further inquiry from Stimler, the representative indicated that American Title was informed that the judgment lien was "discharged" in January 2003 following the filing of a Chapter 7 bankruptcy by Mathias and Teresa.

{¶12} Raschke Engraving argued that it had a valid and subsisting lien on the property before HSBC acquired its interest in the property. Thus, when HSBC recorded its interest, Raschke Engraving's lien had priority over the later-filed mortgage. While acknowledging that there is a split in the appellate courts as to whether equitable subrogation should be applied in circumstances where there was negligence on the part of the title agency, Raschke Engraving argued that the facts of this case went beyond a "mere mistake" or ordinary negligence by American Title, but instead reflected culpable negligence and reckless behavior. Accordingly, Raschke Engraving argued that the Supreme Court's decision in *State v. Jones* and this Court's decision in *Leppo, Inc., v. Kiefer* (Jan. 31, 2001), 9th Dist. Nos. 20097 & 20105, should control in this case and preclude the application of equitable subrogation.

{¶13} The *Jones* Court denied equitable subrogation where the mortgage company cancelled its mortgage and failed to refile the refinanced mortgage for a period of three months, during which period the State filed a tax lien on the property, according the State a priority lien over that of the mortgage company. *Jones*, 61 Ohio St. at 103. The Court specifically noted that the "[mortgage company's] own actions led to its dilemma of not obtaining the best priority lien. [The mortgage company] was in complete control of the refinancing application, and, yet, by [its] own actions and inactions, the [S]tate, without acting fraudulently, was able to secure priority of its claim[.]" Id. at 102-103.

{¶14} Raschke Engraving further asserted that in *Leppo, Inc.*, this Court held that equitable subrogation was inapplicable where the party seeking it had demonstrated "culpable negligence." *Leppo, Inc.*, at *2. This Court has barred application of the doctrine where the party requesting such relief was in the best position to protect its own interests. Id., citing *National City Bank v. Forsyth* (July 5, 1989), 9th Dist. No. 13992, at *4. Raschke Engraving argued that HSBC's own actions led to its junior priority status and that it was reckless in proceeding with the loan after its agent had received actual notice of a valid and subsisting lien on the property.

{¶15} In response to Raschke Engraving's motion for summary judgment, HSBC argued that it was entitled to equitable subrogation because it paid off the prior mortgages on the property which predated Raschke Engraving's recorded interest, though it cited to no legal support for its assertion. HSBC did not dispute the timeline of events, nor the fact that American Title erred in determining that Raschke Engraving's judgment lien

was discharged in Mathias and Teresa's bankruptcy, when in fact, it remained valid and unpaid. Instead, HSBC asserted that, under law, the title agency works for the borrowers, here Mathias and Teresa, and not as an agent for the lender, HSBC. Consequently, it asserted that it is not responsible for errors made by American Title as such errors "cannot be imputed to the innocent lender."

{¶16} HSBC distinguished *Jones* by noting that, in *Jones*, the lender waited three months before recording its mortgage, whereas no such similar delay occurred here. HSBC argued that the trial court should instead adopt the approach taken by the Second District in *Washington Mutual Bank, FA v. Aultman*, 2d Dist. No. 2006 09 25, 2007-Ohio-3706. In *Aultman*, the court applied equitable subrogation following the title agent's "inadvertent failure" to discover a pre-existing second mortgage when Washington Mutual paid off the first mortgage previously held by a different lender. *Aultman*, at ¶41. The Second District attributed the negligence to Washington Mutual but considered it a "mere mistake" and noted that the "failure to obtain first-lien position was not due to the bank's failure to follow ordinary business practices to protect its interests," as was the case in *Jones*. Id. Furthermore, the *Aultman* Court noted that the junior lienholder's position would not change as a result of the subrogation, as it was originally second in priority behind the initial first mortgage holder. Id. at ¶42. Accordingly, the court invoked equitable subrogation principles to accord Washington Mutual priority lien status over the second mortgage. HSBC maintained that, similar to the case in *Aultman*, Raschke Engraving was already a junior lienholder behind the original mortgages on the property held by Union Federal Bank and First Merit Bank. Consequently, the

application of equitable subrogation in this instance would not alter the junior lienholder status of Raschke Engraving. HSBC argued that it did not intend to take a subordinate priority to the judgment lien of Raschke Engraving when it executed the refinancing on the property.

{¶17} HSBC also argued that the doctrine of laches bars Raschke Engraving's claim to priority status on the lien. HSBC argued that Raschke Engraving exercised unreasonable delay in asserting its rights, as it was aware in January 2004, that it had an "active challenge" to the lien priority on the property, yet did nothing to protect or assert that right. This inaction, in turn, led HSBC "to believe that it had top priority." HSBC, however, failed to support its laches claim with any legal authority.

{¶18} Initially, we note that the Supreme Court has certified a conflict between the districts as to whether equitable subrogation would be available to a lender in circumstances similar to those presented in this case. *ABN AMRO Mortgage Group, Inc. v. Kangah et al*, No. 2009-0553, 121 Ohio St.3d 1471, 2009-Ohio-2045. The Supreme Court, however, has not decided the matter at this point. We acknowledge that the Second, Fifth, Eighth, and Tenth Districts have previously permitted equitable subrogation in the instance where the lender's title agency erred in conducting its title search. See *Washington Mutual Bank, F.A. v. Aultman*, 2d Dist. No. 2006 09 25, 2007-Ohio-3706; *Fed. Natl. Assn. v. Webb*, 5th Dist. No. 2005CA0013, 2006-Ohio-3574; *ABN AMRO Mtge. Group, Inc. v. Kangah*, 8th Dist. No. 91401, 2009-Ohio-359; *Cadle Co. No. 2 v. Rendezvous Realty* (Sept. 2, 1993), 8th Dist. Nos. 63565 & 63724; *Washington Mutual Bank v. Hopkins*, 10th Dist. No. 07AP-320, 2007-Ohio-7008; *First Union Natl.*

Bank v. Harmon, 10th Dist. No. 02AP-77, 2002-Ohio-4446; *Fed. Home Loan Mortgage Corp. v. Moore* (Sept. 27, 1990), 10th Dist. No. 90AP-546. This Court and the Courts of Appeals in the Sixth, Eleventh, and Twelfth Districts, however, have declined to extend the principle of equitable subrogation in similar circumstances. See *Leppo, Inc.*, supra; *Genoa Banking Co. v. Tucker*, 6th Dist. No. WD-08-068, 2009-Ohio-4918; *Huntington Natl. Bank v. Allgier*, 6th Dist. No. WD-07-061, 2008-Ohio-1289; *Assoc. Fin. Servs. Corp. v. Miller* (Apr. 5, 2002), 11th Dist. No. 2001-P-0046; *FirstMerit Bank, N.A. v. Andrews*, 11th Dist. No. 2003-P-0121, 2004-Ohio-5104; *Chase Manhattan Bank v. Westin*, 12th Dist. No. CA2002-12-099, 2003-Ohio-5112; *Huntington Nat. Bank v. McCallister* (Feb. 18, 1997), 12th Dist. No. CA96-07-144.

{¶19} Upon further review of the relevant case law, we consider the framework established in *Washington Mutual Bank v. Chiappetta* (2008), 584 F.Supp.2d 961, instructive in our analysis of this issue. With facts analogous to the case at bar, the District Court for the Northern District of Ohio analyzed the Supreme Court's decision to deny equitable subrogation in *Jones* and how other state courts have treated the matter in circumstances where an error by the lender or its title company led to a challenge to the lender's lien priority. In doing so, the district court concluded that the Supreme Court's directive in *Jones* hinged on two key factors: the lender's control over the aspects of the refinancing and the notice it had of the competing property interest. *Chiappetta*, 584 F.Supp.2d at 967-72.

{¶20} Employing this framework, we note that HSBC admitted in its answers to Raschke Engraving's interrogatories that American Title was "the closing agent for both

HSBC and [Mathias and Teresa]." As HSBC's agent in the transaction, presumably American Title was charged with determining the extent to which the property was otherwise encumbered and the amount of funds that HSBC could secure with the property. Moreover, as was the case in *Jones*, it is hard to imagine who, other than HSBC, would be in control of assessing the refinancing application and determining the conditions by which HSBC would refinance the property. Thus, there is evidence that HSBC had control over the transaction. Additionally, we note that HSBC erroneously relied on 11 U.S.C. 2608 to assert that a title agent, by law, works for the borrower under these circumstances. Such is not the case, nor is that what the statute indicates. See 12 U.S.C. 2608 (prohibiting the sellers of real estate from requiring a buyer, who is utilizing a federally related mortgage loan, to purchase title insurance from a specified title company).

{¶21} The trial court determined that American Title discovered the lien, a factual finding that HSBC does not dispute. In terms of the notice afforded to HSBC as to the existence of the judgment lien, HSBC acknowledged in its supporting affidavits that its agent, American Title, received actual knowledge of the existence of Raschke Engraving's lien and that it remained valid and unpaid. American Title later concluded, in error, that the lien was "discharged" through Mathias and Teresa's bankruptcy proceeding. Such error, however, does not alter the fact that American Title possessed actual notice of the lien which was properly recorded by Raschke Engraving, first when it discovered the lien upon completing its title search, as well as subsequent to the search when it received actual notice of the lien from Attorney Stimler. See *Leppo, Inc.*, at *4.

Based on these undisputed facts, we conclude that HSBC had notice of Raschke Engraving's lien. Accordingly, we conclude that HSBC had both control over the transaction and notice of the judgment lien sufficient to preclude it from prevailing on its claim for equitable subrogation. See *Chiappetta*, 584 F.Supp.2d at 967-72.

{¶22} We further note that this conclusion is consistent with this Court's decision in *Leppo, Inc.*, where we denied a lender's request for equitable subrogation because the lender's agent had committed "culpable negligence." *Leppo, Inc.*, at *2. In *Leppo, Inc.*, the lender's title company failed to discover two liens of record and the borrower proceeded to issue the mortgage subject to any "encumbrances of record." Id. In contrast to *Leppo, Inc.* where the title company did not actually discover the lien, HSBC's title company discovered Raschke Engraving's lien, confirmed that the lien existed and remained unpaid, erroneously concluded in the face of such information that the lien had been discharged, and proceeded to aid HSBC in refinancing the property. At the very least, American Title could have replied to Attorney Stimler, informing him of its belief that the judgment lien had been discharged in bankruptcy and that no funds were being released in satisfaction of Raschke Engraving's lien. Most importantly, in light of Attorney Stimler's assertion that the lien was valid notwithstanding Mathias and Teresa's bankruptcy, American Title was on notice that it needed to fully investigate the validity of the lien. Instead, American Title's affidavit reflects that it accepted the unspecified "communications" of one attorney over the verbal statement and written correspondence it received from another. Specifically, in the affidavit attached to HSBC's response motion, a representative from American Title indicated that

"[American Title] exchanged communications with bankruptcy counsel for [Mathias and Teresa], who informed [American Title] that the debt underlying [Raschke Engraving judgment lien] was discharged through Chapter [7] Bankruptcy proceedings." The affidavit does not identify what "communications" were exchanged or append any supporting correspondence, nor does it state the name of the "bankruptcy counsel" from whom American Title received such information or the date on which such "communications" occurred. Notwithstanding, the communication that HSBC has identified with unknown bankruptcy counsel did not give HSBC's title company any salient information concerning the actual status of the lien. Rather, HSBC's title company only received information relative to Mathias and Teresa's personal liability for the obligation underlying the lien. Further inquiry would have revealed that while Mathias and Teresa may have been personally relieved of the liability underlying the lien, it did not follow that lien itself did not remain valid. This course of conduct is unlike the "inadvertent failure" of a lender to discover a second mortgage and constitutes more than a "mere mistake," as was the case in *Aultman*. *Aultman* at ¶41. We consider the events leading to the case at bar akin to the "culpable negligence" demonstrated in *Leppo, Inc.* which barred the application of equitable subrogation. Accordingly, this is not the case where HSBC's equity is strong or its right to equitable subrogation is clear. *Jones*, 61 Ohio St.2d at 102. Moreover, the record supports the conclusion that HSBC was in the best position to protect its own interest. *Leppo, Inc.*, at *2.

{¶23} With respect to HSBC's claim that the doctrine of laches bars Raschke Engraving's claim, the record provides evidence to the contrary. Upon creating its

judgment lien in 2002, Raschke Engraving renewed its filing in 2007 and again following the bankruptcy filing of Mathias and Teresa. Upon HSBC's initiation of foreclosure proceedings, Raschke Engraving timely asserted its claim to a priority lien status over that of HSBC. HSBC's arguments otherwise lacks merit.

{¶24} Based on our review of the record and the binding precedent of this Court, we conclude that the trial court did not err in granting summary judgment in favor of Raschke Engraving and denying HSBC's motion for the same. Accordingly, we overrule HSBC's sole assignment of error.

III

{¶25} HBSC's sole assignment of error is overruled. The judgment of the Summit County Court of Common Pleas is affirmed.

Judgment affirmed.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is

instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellant.

BETH WHITMORE
FOR THE COURT

BELFANCE, P. J.
MOORE, J.
CONCUR

APPEARANCES:

MARK F. CRAIG and CHRISTOPHER F. SWING, Attorneys at Law, for Appellant.

MICHAEL MORAN, Attorney at Law, for Appellees.