

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

U.S. BANK NATIONAL ASSOCIATION,	:	APPEAL NO. C-0900221
as Trustee for Structured Asset Securities	:	TRIAL NOS. A-0705404
Corporation Mortgage Pass-Through	:	A-0900366
Certificates, 2006-GEL2 c/o Wells Fargo	:	
Bank, N.A.,	:	<i>JUDGMENT ENTRY.</i>
Plaintiff-Appellant,	:	
vs.	:	
KIM NGUYEN,	:	
JAMIE DOE, name unknown, spouse of	:	
Kim Nguyen,	:	
and	:	
STATE OF OHIO, c/o Ohio Attorney	:	
General,	:	
Defendants,	:	
and	:	
THE BANK OF KENTUCKY, INC.,	:	
Defendant-Appellee	:	

We consider this appeal on the accelerated calendar, and this judgment entry is not an opinion of the court.¹

On October 13, 1999, Heather Wells acquired the property located at 11590 Mill Road, Cincinnati, by way of a general warranty deed. This deed, which listed the

¹ See S.Ct.R.Rep.Op. 3(A), App.R. 11.1(E), and Loc.R. 12.

grantee as “Heather Wells,” was recorded in Hamilton County on November 17, 1999.

On July 23, 2002, Heather Minger (formerly known as Heather Wells) and Steven Minger granted a mortgage on the property at 11590 Mill Road to ABN AMRO in exchange for a loan of \$144,000. On September 9, 2002, the two granted a second mortgage to U.S. Bank in exchange for a loan of \$18,000. The ABN AMRO mortgage was recorded on October 3, 2002, and the U.S. Bank mortgage was recorded on November 13, 2002. Both mortgages were recorded in Hamilton County.

Nearly three years later, on July 7, 2005, the defendant-appellee, the Bank of Kentucky, filed a certificate of judgment in its favor against Heather A. Minger, Steven Minger, and others in the amount of \$2,700,800.52. The certificate was filed in Hamilton County, and the name “Heather Wells” appeared nowhere on the certificate (Hamilton C.P. No. CJo5007686).

On November 8, 2005, Heather Minger and Steven Minger conveyed the property located at 11590 Mill Road to Kim Nguyen (“Nguyen”) by way of a general warranty deed. The deed listed “Heather Minger, fka Heather Wells, and Steven Minger, husband and wife” as the grantors. Nguyen borrowed \$183,350 of the \$193,000 purchase price and granted a mortgage in the borrowed amount to Mortgage Electronic Registration Systems, Inc. (“MERS”), the nominee for the lender. A title search for the property was conducted by a third party, but the Bank of Kentucky’s certificate of judgment filed in July 2005 was not discovered. A portion of the purchase price received by the Mingers was used to pay off the two mortgages filed in 2002 (the ABN AMRO and U.S. Bank mortgages). Both the general warranty deed conveying the property to Nguyen and the mortgage granted to MERS were filed in Hamilton County on November 17, 2005.

Subsequently, on June 19, 2007, U.S. Bank National Association (“U.S. Bank”) initiated foreclosure proceedings against Nguyen (Hamilton C.P. No. A-0705404). Presumably, U.S. Bank had discovered the Bank of Kentucky’s July 2005 certificate of judgment prior to filing suit, because the Bank of Kentucky was listed as a co-defendant in the initial complaint. One day later, on June 20, 2007, MERS assigned its mortgage to U.S. Bank, which recorded its assigned interest in Hamilton County on June 26, 2007. Although the case numbered A-0705404 was never dismissed, U.S. Bank refiled its foreclosure complaint against Nguyen on January 14, 2009 (Hamilton C.P. No. A-0900366), and the Bank of Kentucky was again listed as a co-defendant. The two cases were then consolidated.

U.S. Bank and the Bank of Kentucky filed competing motions for summary judgment, each asserting that its own lien was superior to the other’s lien. The trial court granted the Bank of Kentucky’s motion and overruled U.S. Bank’s motion, holding that the Bank of Kentucky’s certificate of judgment filed in July 2005 was superior to U.S. Bank’s mortgage, which was obtained through assignment in June 2007. U.S. Bank now appeals, asserting two assignments of error.

Civ.R. 56(C) states that before summary judgment is granted, it must be determined that (1) there exists no genuine issue of any material fact; (2) the moving party is entitled to judgment as a matter of law; and (3) from the evidence it appears that reasonable minds can come to but one conclusion, and with the evidence viewed most strongly in favor of the nonmoving party, that conclusion is adverse to the nonmoving party.² Further, questions of law are subject to a de novo standard of review.³

² *State ex rel. Cassels v. Dayton City School Dist. Bd. of Edn.* (1994), 69 Ohio St.3d 217, 219, 631 N.E.2d 150.

³ *Ohio Bell Tel. Co. v. Pub. Util. Comm.* (1992), 64 Ohio St.3d 145, 147, 593 N.E.2d 286.

In its first assignment of error, U.S. Bank asserts that the trial court erred when it granted the Bank of Kentucky's motion for summary judgment. It reasons that the Bank of Kentucky's certificate of judgment never attached to the property because the property was titled in a name ("Heather Wells") that did not match the name listed on the certificate ("Heather A. Minger"). Because the certificate of judgment never perfected, the certificate never became a legitimate lien on the property, and the Bank of Kentucky had no interest in the property.⁴

Alternatively, U.S. Bank asserts that even if one were to assume that the Bank of Kentucky's certificate of judgment did attach to the property, U.S. Bank had attained the status of a bona fide mortgagee. A bona fide mortgagee takes its interest free and clear of any competing interest, provided that the mortgagee has given value and is without notice, actual or constructive, of any competing interests.⁵ U.S. Bank claims that it met both of these requirements when it obtained the assignment of the mortgage, and thus, that its interest in the property was superior to the Bank of Kentucky's certificate of judgment.

Both arguments U.S. Bank presents in its first assignment of error fail. First, the Bank of Kentucky's certificate of judgment attached to the property when it was filed on July 7, 2005. R.C. 2329.02 states that a judicial lien is created the moment it is filed with the clerk of courts "upon lands and tenements of each judgment debtor". This is not a case where Heather Wells and Heather Minger are two different persons; it is undisputed that Heather Wells and Heather Minger are one and the same. Therefore, based upon the plain language of the statute, and because Heather

⁴ See, generally, *Kay Gee Produce Co. v. Salem* (1997), 120 Ohio App.3d 529, 532, 698 N.E.2d 485; *Reed v. Hardman*, 2005-Ohio-4394.

⁵ *Wayne Bldg. & Loan Co. v. Yarborough* (1967), 11 Ohio St.2d 195, 200, 228 N.E.2d 841, citing *Miner v. Wallace* (1841), 10 Ohio 403.

Wells is the same person as Heather Minger, a lien was created by statute the moment the certificate of judgment was filed with the clerk of courts.

To further this point, we note that a federal bankruptcy court, when confronted with the same problem of conflicting names on a deed and a certificate of judgment, applied Ohio law and held, “The law in Ohio is quite clear that when a certificate of judgment is filed with the office of the clerk of the common pleas, a lien is immediately created upon the lands of the judgment debtor.”⁶ The court continued, “Significantly, [R.C. 2329.02] does not say that the certificate of judgment will be a lien on all real estate in the name of the debtor; instead, the statute is simply concerned with land and tenements *of* the debtor. There is nothing in the statute to indicate that the technicalities of record title should be controlling in determining the effect of a certificate of judgment. Nor does the statute require the judgment creditor to affix other names used by the debtor.”⁷ We agree with the reasoning of the bankruptcy court and hold that the Bank of Kentucky’s certificate of judgment attached when it was filed.

In addition, U.S. Bank’s reliance on *Kay Gee Produce Co. v. Salem*⁸ is misplaced. In that case, the judgment creditor listed a nickname on the lien, not the debtor’s correct name.⁹ A diligent title search could not have discovered the lien due to the use of the nickname.¹⁰ In the case at bar, a diligent title search did in fact discover the Bank of Kentucky’s certificate of judgment, as the initial complaint, as well as the naming of the Bank of Kentucky as a co-defendant, demonstrates.

⁶ *In re Hafeez* (1991), 133 B.R. 419, 421, citing *Tyler Refrigeration Equip. Co. v. Stonick* (1981), 3 Ohio App.3d 167, 169, 444 N.E.2d 43.

⁷ *Id.* (Emphasis *sic.*)

⁸ (1997), 120 Ohio App.3d 529, 698 N.E.2d 485.

⁹ *Id.* at 531.

¹⁰ *Id.* at 532.

We also reject U.S. Bank's argument that it should have been considered a bona fide mortgagee. As we have previously mentioned, a bona fide mortgagee takes its interest free and clear of any competing interests provided that it has given value and has no actual or constructive knowledge of any competing interests.¹¹

Upon review of the record, it appears that U.S. Bank had both actual and constructive notice of the Bank of Kentucky's interest. The act of filing a certificate of judgment automatically provides constructive notice to all of the existence of a lien.¹² Thus, at the very least, U.S. Bank had constructive notice of the Bank of Kentucky's interest when the certificate of judgment was filed on July 7, 2005. But not only did U.S. Bank have constructive notice of a competing lien, it likely had actual notice as well. U.S. Bank filed the initial foreclosure complaint against Nguyen (and co-defendant the Bank of Kentucky) on June 19, 2007. In the complaint, U.S. Bank listed most of the pertinent details regarding the Bank of Kentucky's certificate of judgment, including the names of judgment debtors, the case number, and the date and location of filing. However, U.S. Bank did not obtain an interest in the property until MERS had assigned the mortgage to it on June 20, 2007, one day after the filing of U.S. Bank's complaint. It certainly appears from this sequence that U.S. Bank had actual knowledge of a competing lien when it obtained its interest in the property. Thus, U.S. Bank cannot claim that it was a bona fide mortgagee.

Because the Bank of Kentucky's interest in the property attached at the time it filed its certificate of judgment, which was prior to U.S. Bank's acquisition of its mortgage interest, thus making the Bank of Kentucky first in time, and because U.S.

¹¹ *Wayne Bldg. & Loan Co. v. Yarborough* (1967), 11 Ohio St.2d 195, 200, 228 N.E.2d 841, citing *Miner v. Wallace* (1841), 10 Ohio 403.

¹² *Standard Hardware & Supply Co. v. Bolen* (1996), 115 Ohio App.3d 579, 582, 685 N.E.2d 1264.

Bank was not a bona fide mortgagee, we overrule U.S. Bank's first assignment of error.

In its second assignment of error, U.S. Bank argues that because it had satisfied two prior liens that had priority over the Bank of Kentucky's certificate of judgment (the July 23, 2002, ABN AMRO mortgage and the September 9, 2002, U.S. Bank mortgage), and because it intended to hold the first and best lien on the property, the doctrine of equitable subrogation should have been applied by the trial court to give its assignment priority over the Bank of Kentucky's certificate of judgment.

We have previously held that "equitable subrogation '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.'" ¹³ To claim equitable subrogation, "a party must demonstrate that its equity is strong and its case is clear. A party is not entitled to equitable subrogation if that party has failed to act in accordance with ordinary and reasonable business practices to establish priority."¹⁴ Also, in this appellate district, one cannot claim protection under equitable subrogation if it had actual knowledge of a prior lien.¹⁵

We have overruled U.S. Bank's first assignment of error in part because it appeared to have actual knowledge of the Bank of Kentucky's competing lien. We also overrule its second assignment of error for the same reason. We fail to see how U.S. Bank could *not* have had actual knowledge of the Bank of Kentucky's certificate of judgment when it filed the original foreclosure complaint on June 19, 2007, *one*

¹³ *Old Republic Natl. Title Ins. Co. v. Fifth Third Bank*, 1st Dist. No. C-070567, 2008-Ohio-2059, at ¶12; accord *Federal Union Life Ins. Co. v. Deitsch* (1934), 127 Ohio St. 505, 510, 189 N.E. 440. See, also, *Morequity, Inc. v. Fifth Third Bank*, 1st Dist. No. C-080824, 2009-Ohio-2735, at ¶12.

¹⁴ *Morequity, Inc.*, *supra*, at ¶13. See, also, *Old Republic Natl. Title Ins. Co.*, *supra*, at ¶12 and 13.

¹⁵ *Morequity, Inc.*, *supra*, at ¶16.

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day before it obtained its interest in the property through the assignment from MERS. Again, a party that has actual knowledge of a prior, competing lien cannot be protected through the doctrine of equitable subrogation.

Both of U.S. Bank's assignments of error are overruled. Therefore, we affirm the trial court's judgment.

A certified copy of this judgment entry is the mandate, which shall be sent to the trial court under App.R. 27. Costs shall be taxed under App.R. 24.

HENDON, P.J., SUNDERMANN and MALLORY, JJ.

To the Clerk:

Enter upon the Journal of the Court on December 23, 2009

per order of the Court _____.

Presiding Judge