

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

PEOPLES COMMUNITY BANK,	:	APPEAL NO. C-0900488
	:	TRIAL NO. A-0805990
Plaintiff-Appellant,	:	
vs.	:	<i>JUDGMENT ENTRY.</i>
PNC BANK, N.A.,	:	
	:	
Defendant-Appellee,	:	
and	:	
BARRY L. NELSON, CYNTHIA L.	:	
NELSON, TREASURER OF	:	
HAMILTON COUNTY, AUDITOR OF	:	
HAMILTON COUNTY, UNKNOWN	:	
TENANT OCCUPANT AND CYNTHIA	:	
L NELSON, TRUSTEE OR HER	:	
SUCCESSOR AS TRUSTEE UNDER	:	
AN AGREEMENT DATED OCTOBER	:	
6, 1995 AS AMENDED IN ITS	:	
ENTIRETY ON JANUARY 10, 2002,	:	
	:	
Defendants.	:	

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

Plaintiff-appellant, Peoples Community Bank (“Peoples”), appeals the trial court’s judgment that determined that the mortgage held by defendant-appellee,

---

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

## OHIO FIRST DISTRICT COURT OF APPEALS

---

PNC Bank, N.A. (“PNC”), had priority over Peoples’s mortgage. For the reasons that follow, we affirm.

The parties to this appeal stipulated to the following facts. Defendants, Barry and Cynthia Nelson, owned real property located at 4267 Marcrest Drive, Cincinnati, Ohio (“the real property”). Originally PNC held a mortgage on the real property, which secured an obligation of \$150,000. This mortgage was recorded on February 11, 1997. The Nelsons then granted a mortgage to The Market Building and Savings Company, securing an obligation of \$518,000 (“the Market Mortgage”). The Market Mortgage was recorded on April 10, 1998. Subsequently, PNC Bank agreed to subordinate the priority of its mortgage to the Market Mortgage.

PNC Bank is now the holder of a promissory note in the amount of \$190,776.21 executed by the Nelsons in February 2000. This note is secured by a mortgage in favor of PNC (“the PNC Mortgage”) that was recorded on June 1, 2000.

In March 2001, The Market Building and Savings Company merged into and subsequently operated as part of Peoples. In the process, Peoples became the owner of the Market Mortgage.

In December 2001, Peoples refinanced the Market Mortgage. As part of the refinance, the Nelsons executed a promissory note in the amount of \$560,000 and granted a mortgage on the real property in favor of Peoples (“the Peoples Mortgage”). \$54,136.54 was distributed to the Nelsons and the remaining amount of the loan was used to pay off the Market Mortgage and settlement charges.

Peoples hired the Tri-Star Title Agency (“Tri-Star”) to serve as the closing agent on the Peoples Mortgage. Tri-Star communicated with a representative of PNC about subordinating the PNC Mortgage to the Peoples Mortgage. Tri-Star faxed “the

requested Subordination” to a PNC representative. Despite this communication, Peoples proceeded with the closing without first securing a subordination agreement signed by a PNC representative. The Peoples Mortgage was recorded on December 18, 2001.

In September 2007, the Nelsons filed a “Chapter 13 Bankruptcy action” and surrendered the real property as part of their confirmed plan. The Nelsons defaulted on both Peoples’s and PNC’s promissory notes. The amount due and owing on the Peoples promissory note was \$509,827.97, as well as accrued interest from October 1, 2007, to June 17, 2008, of \$42,103.45 and interest thereafter at 7.25% per annum on the principal amount, plus late charges. The amount due and owing on the PNC promissory note was \$190, 776.21, plus interest at the rate of 5.25% per annum from August 3, 2007.

In June 2008, Peoples filed a complaint for foreclosure and other relief. PNC filed its answer and counterclaim, alleging that it had the first and best lien on the property. Peoples moved for summary judgment, which was denied. After a default judgment was entered against the Nelsons, the trial court entered a judgment of foreclosure on the real property, determining that “[the PNC Mortgage] had priority over [the Peoples Mortgage] and any other interest of any party with the exception of the Hamilton County Treasurer.” This appeal followed.

In its first assignment of error, Peoples asserts that the trial court erred by denying its motion for summary judgment when, as a matter of law, the Peoples Mortgage had priority over the PNC Mortgage under the doctrine of equitable subrogation. We are unpersuaded.

An appellate court reviews a grant of summary judgment de novo.<sup>2</sup> Under Civ.R. 56(C), 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) reasonable minds can come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made, such party being entitled to have the evidence construed most strongly in its favor.<sup>3</sup>

Generally, a mortgage first recorded has priority over mortgages recorded later in time.<sup>4</sup> But the doctrine of equitable subrogation may be used in certain situations to overcome this rule of first in time, first in right. 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.”<sup>5</sup> To claim equitable subrogation, a party’s equity must be strong and his case must be clear.<sup>6</sup> The right to such relief depends upon the facts and circumstances of each particular case.<sup>7</sup>

Many courts, including this one, have held that equitable subrogation cannot be used to benefit parties who are negligent in their business transactions, and who are in the best position to protect their own interests.<sup>8</sup> Further, in this appellate

---

<sup>2</sup> *Doe v. Shaffer*, 90 Ohio St.3d 388, 390, 2000-Ohio-186, 738 N.E.2d 1243.

<sup>3</sup> *State ex rel. Grady v. SERB*, 78 Ohio St.3d 181, 183, 1997-Ohio-221, 677 N.E.2d 343.

<sup>4</sup> R.C. 5301.23; *Old Republic Natl. Title Ins. Co. v. Fifth Third Bank*, 1st Dist. No. C-070567, 2008-Ohio-2059, ¶11.

<sup>5</sup> *Old Republic Natl. Title Ins. Co.*, supra, at ¶12, citing *State v. Jones* (1980), 61 Ohio St.2d 99, 102, 399 N.E.2d 1215.

<sup>6</sup> *Jones*, supra, at 102.

<sup>7</sup> *Id.*

<sup>8</sup> *Old Republic Natl. Title Ins. Co.*, supra, at ¶13.

district, one cannot claim protection under equitable subrogation if it had actual knowledge of a prior lien.<sup>9</sup>

Following our review of the record, we cannot conclude that Peoples was entitled to equitable subrogation in the case at bar. Peoples was aware of PNC's mortgage against the real property and failed to secure an executed subordination agreement prior to closing. Peoples had knowledge of PNC's lien and thus was in the best position to protect its own interest, but it failed to do so.

Peoples argues that the doctrine of equitable subrogation should be applied because it had satisfied the Market Mortgage, which had priority over the PNC mortgage. In addition, it was Peoples's intent to hold the first and best lien on the property, while it was PNC's intent to hold a subordinate lien at the time it received its mortgage on the real property. Peoples cites *ABN AMRO Mtge. Group, Inc. v. Kangah*<sup>10</sup> in support of its arguments.

But *Kangah* is easily distinguishable from the case at bar. In *Kangah*, the Eight Appellate District held that the doctrine of equitable subrogation applied when the mortgage company asserting the doctrine had refinanced a prior lien, intended to have the first and best lien on the property and *had been unaware of the competing lien due to its mistake during the title search*. Thus, the lender in *Kangah* was never aware of the prior mortgage.

Conversely, in the case at bar, Peoples knew of the competing mortgage, was in the best position to protect itself, and yet failed to follow through in finalizing the

---

<sup>9</sup> *Morequity, Inc. v. Fifth Third Bank*, 1st Dist. No. C-080824, 2009-Ohio-2735, at ¶16.

<sup>10</sup> *ABN AMRO Mortgage Group, Inc. v. Kangah*, 180 Ohio App.3d 689, 2009-Ohio-359, 906 N.E.2d 1195.

subordination agreement prior to closing. In a case such as this, equitable subrogation cannot be applied.

The first assignment of error is overruled.

In its final assignment of error, Peoples maintains that the trial court erred by denying its motion for summary judgment when, as a matter of law, Peoples had the superior lien under the doctrine of equitable estoppel. We disagree.

Under the doctrine of equitable estoppel, relief may be afforded where one party induces another to believe certain facts are true and the other party changes his position in reasonable reliance to his detriment on those facts.<sup>11</sup> The purpose of equitable estoppel is to prevent actual or constructive fraud and to promote the ends of justice.<sup>12</sup> To make a prima facie case for equitable estoppel, one must show (1) a factual representation, (2) that is misleading, (3) that induces actual reliance that is reasonable and in good faith, and (4) that causes detriment to the relying party.<sup>13</sup>

Peoples argues that it detrimentally relied on PNC's representation that it would execute a subordination agreement. But there is no evidence in the record of this representation. Although Peoples points to the fact that Tri-Star had faxed to PNC the "requested Subordination," this did not demonstrate that PNC had agreed to execute any such subordination agreement. Because there is no evidence demonstrating that PNC made a misrepresentation to Peoples, we cannot conclude that the doctrine of equitable estoppel should have applied to award Peoples the superior lien.

---

<sup>11</sup> *Hutchinson v. Wenzke* (1999), 131 Ohio App.3d 613, 723 N.E.2d 176, citing *State ex rel. Cities Serv. Oil Co. v. Orteca* (1980), 63 Ohio St.2d 295, 409 N.E.2d 1018.

<sup>12</sup> *Id.*, citing *Ohio State Bd. of Pharmacy v. Frantz* (1990), 51 Ohio St.3d 143, 145, 555 N.E.2d 630.

<sup>13</sup> *Id.*, citing *Doe v. Blue Cross/Blue Shield of Ohio* (1992), 79 Ohio App.3d 369, 379, 607 N.E.2d 492.

**OHIO FIRST DISTRICT COURT OF APPEALS**

---

The second assignment of error is overruled. Because the trial court properly denied Peoples's motion for summary judgment and determined that the PNC Mortgage had priority, the judgment of the trial court is affirmed.

Further, a certified copy of this judgment entry shall be sent to the trial court under App.R. 27. Costs shall be taxed under App.R. 24.

**CUNNINGHAM, P.J., HILDEBRANDT and DINKELACKER, JJ.**

*To the Clerk:*

Enter upon the Journal of the Court on September 3, 2010

per order of the Court \_\_\_\_\_.  
Presiding Judge