

NOTICE

This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

2015 IL App (4th) 140850-U

NO. 4-14-0850

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED

July 24, 2015

Carla Bender

4th District Appellate

Court, IL

PBEI HOLDINGS, LLC, a Missouri Limited Liability Company,)	Appeal from
Plaintiff-Appellee,)	Circuit Court of
v.)	Coles County
FIRST NATIONAL BANK OF DIETERICH, as)	No. 13CH27
Successor to FIRST STATE BANK OF RED BUD,)	
Defendant-Appellant.)	
and)	
NORBERT KNOLLMANN,)	
Defendant-Appellee,)	
and)	
LAKELAND ESTATES MHP, LLC, an Illinois Limited Liability Company; LARRY J. WINKLER; NANCY KNOLLMAN; UNKNOWN OWNERS; and)	Honorable
NONRECORD CLAIMANTS,)	Teresa K. Righter,
Defendants.)	Judge Presiding.

JUSTICE HARRIS delivered the judgment of the court.
Justices Holder White and Steigmann concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court erred in granting partial summary judgment in plaintiff's favor on the issue of lien priority when neither the doctrine of conventional subrogation nor the doctrine of equitable subrogation applied under the facts presented.

¶ 2 During mortgage foreclosure proceedings, the trial court granted partial summary judgment in favor of plaintiff, PBEI Holdings, LLC, a Missouri Limited Liability Company (PBEI), with respect to an issue of lien priority, finding PBEI held a lien on real estate that had priority over a lien held by defendant, First National Bank of Dieterich (FNB Dieterich). FNB

Dieterich appeals, arguing the court erred in finding the doctrine of conventional subrogation applied and granting summary judgment in PBEI's favor. We reverse and remand.

¶ 3

I. BACKGROUND

¶ 4

The underlying facts are not in dispute. On June 19, 2007, Lakeland Estates MHP, LLC, an Illinois Limited Liability Company (Lakeland), purchased the real estate at issue on appeal, a mobile home park, from Norbert and Nancy Knollmann. Lakeland financed its purchase of the mobile home park with two loans. Its first loan was obtained from the First State Bank of Red Bud (Bank of Red Bud) in the amount of \$750,000 and was secured by a mortgage on the property recorded on June 19, 2007, as document number 0700036. Lakeland obtained its second loan in the amount of \$400,000, from the Knollmanns. That loan was secured by a mortgage on the property that was recorded June 19, 2007, as document number 0700038. Later, the Bank of Red Bud loaned Lakeland an additional \$242,058 for the purchase of 10 mobile homes. That loan was also secured by a mortgage on the property, which was recorded on September 17, 2007, as document number 0702184.

¶ 5

On April 7, 2008, Lakeland obtained a loan from Premier Bank (Premier) for \$750,000. A promissory note identified the purpose of the loan as being "TO REFINANCE THE PURCHASE OF A MOBILE HOME PARK FINANCED AT [the Bank of Red Bud]." The loan was secured by a mortgage on the property, which was recorded on April 8, 2008, as document number 0706503. Further, the mortgage contained the following provision:

"5. PRIOR SECURITY INTERESTS. With regard to any other mortgage, deed of trust, security agreement or other lien document that created a prior security interest or encumbrance on the Proper-

ty, Mortgagor agrees:

- A. To make all payments when due and to perform or comply with all covenants.
- B. To promptly deliver to Lender any notices that Mortgagor receives from the holder.
- C. Not to allow any modification or extension of, nor to request any future advances under any note or agreement secured by the lien document without Lender's prior written consent."

Also, on April 7, 2008, the Knollmanns entered into a subordination agreement with Premier. Pursuant to that document, the Knollmanns agreed their mortgage lien—which had been recorded on June 19, 2007, and was the second-recorded mortgage on the property—was "subject and subordinate" to Premier's mortgage lien.

¶ 6 The parties agree Lakeland used loan amounts it received from Premier to pay off the first loan it obtained from the Bank of Red Bud. On April 21, 2008, the Bank of Red Bud recorded a release of its first mortgage on the property.

¶ 7 On October 15, 2010, Premier was closed and the Federal Deposit Insurance Corporation (FDIC) was appointed receiver and took charge of Premier's assets and affairs. On September 4, 2012, the FDIC assigned Premier's note and mortgage, executed and recorded in April 2008, to Providence Bank (Providence). Additionally, the record shows FNB Dieterich became the successor to the Bank of Red Bud.

¶ 8 On April 3, 2013, Providence filed a complaint to foreclose mortgage and for oth-

er relief. In count I of its complaint, Providence sought to foreclose on the mortgage dated April 7, 2008. It alleged Lakeland defaulted by failing to pay principal and accrued interest due under the promissory note.

¶ 9 Relevant to this appeal, Providence's complaint also contained a count seeking a declaratory judgment as to lien priority. It asserted that, pursuant to the doctrines of conventional and equitable subrogation, the trial court should find that the mortgage lien it held (the fourth-recorded mortgage originally held by Premier) had priority over the mortgage lien held by FNB Dieterich (the third-recorded mortgage originally held by the Bank of Red Bud). Providence asserted that by "express agreement" Premier, its predecessor, loaned Lakeland funds to pay off the first mortgage held by the Bank of Red Bud and "substitut[e] Premier's lien to the first position formerly held by *** Bank of Red Bud." Providence further alleged the Bank of Red Bud knew its second loan to Lakeland, secured by a mortgage recorded on September 17, 2007, was the third mortgage on the property and inferior to both the first mortgage (also originally held by the Bank of Red Bud) and the second mortgage (held by the Knollmanns). Finally, Providence asserted applying the doctrine of subrogation would "not harm any innocent third parties and would equitably place all parties in the positions to which they intended."

¶ 10 On June 24, 2013, Providence filed a motion to substitute PBEI as the plaintiff in the matter, asserting it had assigned its interest in the promissory note and mortgage to PBEI. On July 3, 2013, the trial court substituted PBEI as plaintiff.

¶ 11 Ultimately, PBEI and FNB Dieterich filed cross-motions for partial summary judgment on the issue of lien priority. On March 31, 2014, PBEI filed its motion for summary judgment. It acknowledged the rule that the first mortgage recorded is entitled to priority; how-

ever, it asserted "the law of subrogation" applied as an exception to the general rule. Specifically, PBEI asserted the "doctrine of subrogation" applied to grant its mortgage lien, recorded April 8, 2008, priority over the mortgage lien held by FNB Dieterich, which was recorded on September 17, 2007. On May 12, 2014, FNB Dieterich filed its motion for partial summary judgment. It maintained that not all of the necessary requirements for application of the doctrine of conventional subrogation had been met and, thus, the mortgage lien held by PBEI was not entitled to priority. On June 11, 2014, the trial court granted PBEI's motion for partial summary judgment, finding the doctrine of conventional subrogation applied to the facts of the case and holding PBEI was entitled to be subrogated to the priority position held by Bank of Red Bud as first mortgagee.

¶ 12 On August 28, 2014, the trial court entered a judgment of foreclosure and sale. Relevant to this appeal, its judgment provided that the mortgage held by FNB Dietrich was "inferior to the claim of [PBEI] because [PBEI] is entitled to subrogation of its lien to the priority status formerly held by the Bank of Red Bud as the first mortgagee." As part of its judgment, the court found "no just reason to delay enforcement of or appeal from [its] judgment" pursuant to Illinois Supreme Court Rule 304 (eff. Feb. 26, 2010).

¶ 13 This appeal followed.

¶ 14 II. ANALYSIS

¶ 15 On appeal, FNB Dieterich argues the trial court erred in granting PBEI's motion for partial summary judgment. It maintains the requirements of conventional subrogation were not met under the facts of this case and, as a result, the fourth-recorded mortgage held by PBEI is not entitled to priority over the third-recorded mortgage held by FNB Dieterich.

¶ 16 A party is entitled to summary judgment "if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." 735 ILCS 5/2-1005(c) (West 2012). "Where the parties file cross-motions for summary judgment *** they concede the absence of a genuine issue of material fact and agree that only questions of law are involved, and they invite the court to decide the issues based on the record." *Nationwide Financial, LP v. Pobuda*, 2014 IL 116717, ¶ 25, 21 N.E.3d 381. Summary judgment rulings are subject to *de novo* review. *Bruns v. City of Centralia*, 2014 IL 116998, ¶ 13, 21 N.E.3d 684.

¶ 17 "A mortgage is a type of consensual lien on real property." *Aames Capital Corp. v. Interstate Bank of Oak Forest*, 315 Ill. App. 3d 700, 703, 734 N.E.2d 493, 496 (2000). "A presumption exists that the first mortgage recorded has priority." *Aames*, 315 Ill. App. 3d at 704, 734 N.E.2d at 496. However, "[t]he doctrine of first in time, first in right is not always as clear and obvious as it may seem" and one consideration when applying the doctrine "is the law surrounding subrogation." *Aames*, 315 Ill. App. 3d at 704-05, 734 N.E.2d at 497. "Subrogation is a method whereby one who had involuntarily paid a debt of another succeeds to the rights of the other with respect to the debt paid" and "has been applied to subrogate one party to the lien priority of another." *Aames*, 315 Ill. App. 3d at 705, 734 N.E.2d at 497.

¶ 18 "[I]n terms of real property, the doctrine of conventional subrogation holds that, when a refunding mortgage is made, the lien of the old mortgage continues in effect without interruption and the refunding mortgage does not become subordinate to an intervening lien or interest attaching between the time the old mortgage was recorded and the effective date of the refunding mortgage, even though the old mortgage has been released." *LaSalle Bank, N.I. v. First*

American Bank, 316 Ill. App. 3d 515, 521, 736 N.E.2d 619, 625 (2000). "Conventional subrogation occurs when there is an express agreement between the parties to the effect that the party paying the debts on behalf of the third party will be able to assert the rights of the original creditor." *Union Planters Bank, N.A. v. FT Mortgage Companies*, 341 Ill. App. 3d 921, 925, 794 N.E.2d 360, 364 (2003). "In addition to the requirement of an express agreement, the lender seeking the benefits of a conventional subrogation must prove that the loan proceeds were used to refinance the mortgage for which the lender seeks to be subrogated, that no harm will come to an innocent party if priority is granted to the lender, and that there has been no gross negligence." *Union Planters Bank*, 341 Ill. App. 3d at 925, 794 N.E.2d at 364 (citing *Home Savings Bank v. Bierstadt*, 168 Ill. 618, 624-25, 48 N.E. 161, 162 (1897)).

¶ 19 FNB Dieterich acknowledges that the loan proceeds Lakeland received from Premier were used to refinance the original loan Lakeland obtained from the Bank of Red Bud and which was secured by the first-recorded mortgage. However, it contends none of the other requirements for conventional subrogation are met under the facts presented. For the reasons that follow, we agree the doctrine of conventional subrogation does not apply because the record fails to reflect an express agreement existed between Lakeland and Premier that Premier would be able to assert the lien rights of the original creditor, the Bank of Red Bud.

¶ 20 The supreme court has held conventional subrogation "results from an equitable right springing from an *express agreement* with the debtor, by which one advances money to pay a claim for the security of which there exists a lien, *by which agreement he is to have an equal lien to that paid off.*" (Emphases added.) *Bierstadt*, 168 Ill. at 624, 48 N.E. at 162. "It is the agreement that the security shall be kept alive for the benefit of the person making the payment

which gives the right of subrogation, because it takes away the character of a mere volunteer." *Bierstadt*, 168 Ill. at 624, 48 N.E. at 162.

¶ 21 In *Firstmark Standard Life Insurance Co. v. Superior Bank FSB*, 271 Ill. App. 3d 435, 440-41, 649 N.E.2d 465, 469 (1995), the First District held that the "linchpin" of conventional subrogation cases was "the existence of an express agreement that the interests of a subsequent mortgagor are to be advanced to a first mortgage." There, the court found no evidence of an express agreement that a refinancing mortgage was to have priority where language in that mortgage showed the refinancing lender expressly agreed to a junior mortgage rather than a first mortgage. *Firstmark*, 271 Ill. App. 3d at 441, 649 N.E.2d at 469. On that basis, the court refused to apply the doctrine of conventional subrogation. *Firstmark*, 271 Ill. App. 3d at 441, 649 N.E.2d at 469.

¶ 22 In *Aames*, 315 Ill. App. 3d at 708, 734 N.E.2d at 499-500, the Second District distinguished *Firstmark* on the basis that the refinancing documents before it contained no provision which expressly stated the refinancing mortgage was subject to prior liens. Although there was also no provision in the refinancing documents that explicitly stated the refinancing mortgage was a first mortgage, there were provisions in those documents which, when read together, indicated the parties agreed the refinancing mortgage would be a first priority mortgage. *Aames*, 315 Ill. App. 3d at 708, 734 N.E.2d at 500. Specifically, those documents provided that the debtors "were to discharge any lien that had priority over the [refinancing] mortgage" and that the refinancing lender "may pay any sums secured by a lien that had priority over its mortgage and that any such sum paid would become additional debt secured by the [refinancing] mortgage." *Aames*, 315 Ill. App. 3d at 708, 734 N.E.2d at 500.

¶ 23 In *LaSalle*, 316 Ill. App. 3d at 522, 736 N.E.2d at 625, the First District found the doctrine of conventional subrogation had been properly applied by the trial court, in part, because the relevant contractual language expressed an intent to give the subsequent lender a first and prior mortgage. Specifically, the parties' loan agreement provided that the lender was to have "a valid first lien on the property" and the mortgage also contained a provision that the liens and security interest created by the mortgage were intended "as first and prior liens on the Property." (Emphases omitted.) *LaSalle*, 316 Ill. App. 3d at 518-19, 736 N.E.2d at 622-23.

¶ 24 Finally, in *Union Planters*, 341 Ill. App. 3d at 928, 794 N.E.2d at 366, the Fifth District also found conventional subrogation was applicable to the facts before it. Regarding the express agreement requirement, the court noted the relevant contract language was similar to the language relied upon in *Aames* and "provided that no subordinate liens were to remain open at closing—to discharge any lien with priority over the mortgage—and that the refinancing mortgage holder could pay any sums secured by a lien that had priority over its mortgage and that any such sum paid would become additional debt secured by the mortgage." *Union Planters*, 341 Ill. App. 3d at 926, 794 N.E.2d at 365.

¶ 25 Here, the refinancing documents between Lakeland and PBEI contain no explicit language identifying the refinancing mortgage either as a junior mortgage or a first mortgage. Further, unlike in *Aames*, we find no provisions in the refinancing documents which, when read together, evidence an intent by the parties' that the mortgage now held by PBEI was to take priority over other liens. Instead, as FNB Dieterich points out, the mortgage contains language which contemplates the existence of prior security interests without in any way expressing an intent by the refinancing lender to take priority over those interests.

¶ 26 On appeal, PBEI argues evidence of an express agreement is shown by language identifying the purpose of Premier's loan as to refinance the purchase of the mobile home park. However, the mere fact of refinancing is, by itself, insufficient to warrant application of the doctrine of conventional subrogation. Instead, as demonstrated by the foregoing cases, there must be evidence of an agreement that the subsequent lender "is to have an equal lien to that paid off" (*Bierstadt*, 168 Ill. at 624, 48 N.E. at 162) or, stated another way, "that the interests of a subsequent mortgagor are to be advanced to a first mortgage" (*Firstmark*, 271 Ill. App. 3d at 440-41, 649 N.E.2d at 469). We find no such agreement between the parties in this case.

¶ 27 Here, the trial court erred in finding conventional subrogation applicable to the facts presented. As no express agreement existed between the parties that the refinancing mortgage held by PBEI was intended to have priority, conventional subrogation cannot apply. Further, given our holding it is unnecessary to address the remaining requirements for application of conventional subrogation.

¶ 28 On appeal, PBEI argues that even if conventional subrogation does not apply, it is entitled to priority pursuant to the doctrine of equitable subrogation. Although the trial court did not rely on equitable subrogation in granting PBEI partial summary judgment, PBEI argues this court can affirm the trial court's decision on any basis supported by the record. See *Cornerstone Bank & Trust, N.A. v. Consolidated Grain & Barge Co.*, 2011 IL App (4th) 100715, ¶ 24, 956 N.E.2d 944 (stating this court may "affirm the grant of summary judgment on any basis supported by the record").

¶ 29 "Equitable subrogation is a creature of chancery that is utilized to prevent unjust enrichment." *Aames*, 315 Ill. App. 3d at 706, 734 N.E.2d at 498 (citing *Dix Mutual Insurance*

Co. v. LaFramboise, 149 Ill. 2d 314, 319, 597 N.E.2d 622, 624 (1992)).

"The right of subrogation is an equitable right and remedy which rests on the principle that substantial justice should be attained by placing ultimate responsibility for the loss upon the one against whom in good conscience it ought to fall. [Citation.] Subrogation is allowed to prevent injustice and unjust enrichment but will not be allowed where it would be inequitable to do so. [Citation.] There is no general rule which can be laid down to determine whether a right of subrogation exists since this right depends upon the equities of each particular case. [Citation]." *LaFramboise*, 149 Ill. 2d at 319, 597 N.E.2d at 624.

"Although conventional subrogation is seen sporadically in Illinois case law, equitable subrogation is even more elusive." *Aames*, 315 Ill. App. 3d at 706, 734 N.E.2d at 498.

¶ 30 FNB Dieterich contends PBEI failed to raise the issue of equitable subrogation with the trial court and, therefore, forfeited that issue for purposes of appellate review. Initially, we note "[a] reviewing court 'may affirm a grant of summary judgment on any basis appearing in the record, regardless of whether the trial court relied upon that ground.'" *State Journal-Register v. University of Illinois Springfield*, 2013 IL App (4th) 120881, ¶ 19, 994 N.E.2d 705 (quoting *Perez v. Sunbelt Rentals, Inc.*, 2012 IL App (2d) 110382, ¶ 7, 968 N.E.2d 1082). Further, the record here shows PBEI raised the doctrine of equitable subrogation in its complaint. In its motion for summary judgment PBEI referred to subrogation generally without specifying which type of subrogation it believed applied. Further, when presenting argument to the trial court,

PBEI pointed out that its complaint was "not limited to conventional subrogation" and "also includes equitable subrogation." Thus, under these circumstances, forfeiture does not apply.

¶ 31 In *Detroit Steel Products Co. v. Hudes*, 17 Ill. App. 2d 514, 520, 151 N.E.2d 136, 139 (1958), this court applied equitable subrogation to allow a bank to obtain priority during proceedings to foreclose on mechanic's liens. There, the bank loaned the debtor \$10,000, secured by a mortgage on the real estate at issue. *Detroit Steel*, 17 Ill. App. 2d at 516, 151 N.E.2d at 137. At the time of the loan, the bank inquired as to any unpaid liens, inspected the property, and was informed of two claims of materialmen, which it required the debtor to pay out of the loan proceeds. *Detroit Steel*, 17 Ill. App. 2d at 516, 151 N.E.2d at 137. However, other claims for materials existed which had statutory priority over the bank's mortgage. *Detroit Steel*, 17 Ill. App. 2d at 519, 151 N.E.2d at 138-39. Nevertheless, this court held "equitable principles" permitted the bank to be subrogated to the position of the claims paid with the loan proceeds to the extent of the loans. *Detroit Steel*, 17 Ill. App. 2d at 520-21, 151 N.E.2d at 139. In so holding, we noted "the bank's expectation that it was discharging all prior liens was clear" under the facts presented. *Detroit Steel*, 17 Ill. App. 2d at 521, 151 N.E.2d at 140. Further, we cited case law for the proposition that "[i]t would be highly inequitable and unjust to defeat the intention of the parties." *Detroit Steel*, 17 Ill. App. 2d at 521, 151 N.E.2d at 140 (quoting *Tyrrell v. Ward*, 102 Ill. 29, 37 (1881)).

¶ 32 Here, PBEI does not dispute FNB Dieterich's claim that Premier had knowledge of both the Knollmann's second-recorded mortgage and the Bank of Red Bud's third-record mortgage at the time it loaned money to Lakeland. Although Premier obtained a subrogation agreement from the Knollmann's, the record fails to reflect it took any step that would indicate its

intention to take priority over the third-recorded mortgage originally held by the Bank of Red Bud and now FNB Dieterich. We find this situation distinguishable from *Detroit Steel* where the evidence indicated the bank at issue was operating under the mistaken belief that all prior liens had been paid. Accordingly, the facts presented are not appropriate for application of the doctrine of equitable subrogation and the trial court erred in granting partial summary judgment on the issue of lien priority in favor of PBEI rather than FNB Dieterich.

¶ 33

III. CONCLUSION

¶ 34 For the reasons stated, we reverse the trial court's judgment and remand for further proceedings.

¶ 35 Reversed and remanded.