2010 WL 7378170 (Ohio App. 8 Dist.) (Appellate Brief)
Court of Appeals of Ohio, Eighth District, Cuyahoga County.

DEUTSCHE BANK TRUST CO AMERICAS, Plaintiff-Appellant,

v.

Robert GOLUB, et al., Defendant-Appellee.

No. 95138.
November 30, 2010.

Cuyahoga County Court of Common Pleas No. CV 2005 578814
Appeal from the Cuyahoga County Court of Common Pleas

Brief of Appellee, Keybank National Association

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Cases

1 *STATEMENT OF THE CASE

Appellee, having reviewed the Statement of the Case presented by Appellant in this matter, concurs in that Statement of the Case.

2 *STATEMENT OF FACTS

On April 10, 2000, Robert Golub and Marjorie Golub (hereinafter "the Golubs"), executed a mortgage to KeyBank in the original amount of $100,000.00 (Affidavit of Biagio Oriti, submitted with KeyBank's Motion for Summary Judgment, Para. 2). This mortgage was recorded in the Cuyahoga County records on April 25, 2000. In June, 2004, KeyBank entered into negotiations with New Century Mortgage which negotiations resulted in the execution of a subordination agreement between KeyBank and New Century Mortgage on June 24, 2004 (Affidavit of Biagio Oriti, Para. 3). By the terms of said agreement, KeyBank agreed to subordinate its mortgage to that of New Century Mortgage (Affidavit of Biagio Oriti, Para. 4). Said agreement contained the following language:

This agreement may not be changed or terminated orally and shall be binding upon and inure to the benefit of the respective heirs, legal representatives, successors and assigns of the parties hereto.

KeyBank negotiated the above-mentioned Subordination Agreement specifically with New Century Mortgage (Affidavit of Biagio Oriti, Para. 4). It is KeyBank's standard practice to negotiate each and every Subordination Agreement on a case-by-case basis (Affidavit of Biagio Oriti, Para. 5). At no time did KeyBank negotiate a Subordination Agreement with Appellant (Affidavit of Biagio Oriti, Para 6). Further, KeyBank never consented to subordinate its mortgage to that of any entity other than New Century Mortgage (Affidavit of Biagio Oriti, Para., 7).

Ultimately, New Century Mortgage did not make a loan to the Golubs. However, on or about July 24, 2004, the Golubs executed a Mortgage to Saxon Mortgage, Inc. ***3** Appellant is a successor-in-interest to Saxon Mortgage, Inc. However, Appellant is not an heir, legal representative, successor or assign of New Century Mortgage.

At no time was KeyBank contacted by Saxon Mortgage, Inc., Deutsche Bank Trust Company Americas or any other entity claiming to be a successor or predecessor-in-interest to Saxon Mortgage, Inc. with regard to the subordination of KeyBank's mortgage. (Affidavit of Biagio Oriti, Para. 8). On or about August 3, 2004, the Subordination Agreement between KeyBank and New Century Mortgage was recorded in the Cuyahoga County records. It is unknown to KeyBank who was responsible for did KeyBank consent to the subordination of its Mortgage to that of Saxon Mortgage, Inc.

ARGUMENT

I. *Appellant Is Not Entitled To Reformation*.

Appellant argues that "the instruments" in this case should be reformed to demonstrate the "true intent of the parties". It appears that the instrument to which Appellant refers is the subordination agreement between New Century and KeyBank. This argument is utterly without merit.

At the outset, Appellee wishes to be clear as to what Appellant is actually attempting to do in this case. Appellant is attempting force KeyBank to accept Appellant as a party to a subordination agreement specifically negotiated between New Century and KeyBank, to which Appellant was never a party and was a complete stranger. Appellant argues that equity requires that KeyBank be essentially forced into a contract to which it did not agree.

***4** Appellant argues that once KeyBank agreed to subordinate its interest to New Century, the name of the actual lender making the loan became irrelevant, essentially arguing that KeyBank had no right to determine whether it wanted to subordinate to one lender over another. This dangerous argument is made in spite of the fact that the record clearly shows that KeyBank negotiates each subordination agreement individually and specifically with the lenders involved on a case-by-case basis. This argument also applies in the face of the plain language of the subordination agreement, which states:

> This agreement may not be changed or terminated orally and shall be binding upon and inure to the benefit of the respective heirs, legal representatives, successors and assigns to the parties hereto.

In light of the above language, footnote 9 in Appellant's Brief is somewhat disingenuous. KeyBank clearly never entered into any agreement regarding lien priority to Appellant. Moreover, Appellant has never maintained nor does the evidence suggest that Appellant is an heir, legal representative, successor or assign to New Century Mortgage.

With the above in mind, all of Appellant's arguments ring hollow. Specifically, there is absolutely no basis whatsoever for a "reformation" of the subordination agreement. Appellant accurately sets forth the standard for reformation of an instrument. Appellant believes that *Delfino v. Paul Davies Chevrolet, Inc.* (1965), 2 Ohio St.2d 282, 286 is particularly applicable to this case, stating that the purpose of reformation is to cause an instrument to express the intent of the parties as to its contents and not to create a new obligation. *Id.* Moreover, Appellant correctly relies on *Castle v. Daniels* (1984), 16 Ohio App. 3d 209, which indicates that testimony regarding ***5** the conduct of the parties, course of dealing between them, and method of handling the transaction are entitled to great weight in determining the ultimate facts surrounding a contract. *Id*. at 212.

With the above case law in mind, there is no question that Appellant's reformation argument must fail. The simple and undeniable fact of the matter is that Appellant was at no time a party to the agreement it is asking this Court to reform. In fact, at the time that the agreement was negotiated and executed, Appellant had no role in this transaction whatsoever. The fact of the matter is Appellant does not want the *terms* of the agreement reformed; Appellant wants the *parties* to the agreement reformed. Appellant cannot present evidence as to the conduct of the parties, course of dealing, etc., for the simple fact that it has no personal knowledge of the conduct of the parties at the time the subordination agreement between KeyBank and New Century was negotiated. In essence, contrary to the case law Appellant cites itself, Appellant is asking this Court to create a new obligation, i.e., an obligation between KeyBank and Appellant.

Moreover, as Appellant mentions in its Brief, in order to reform a document on the basis of mistake, it is necessary for that mistake to be mutual, *Id*. at Syllabus. In the present case the subordination agreement at issue not only contains no *mutual* mistake, it contains no mistake whatsoever as to the intent of the parties thereto. KeyBank maintains that the subordination agreement did, in fact, set forth the terms of the agreement between itself and New Century. The only mistake that occurred in this matter was when Appellant failed to adequately protect itself and obtained a subordination agreement directly between itself and KeyBank. Appellant's **neglect** in ***6** regard to this issue puts it in a position of now arguing that it is somehow equitable to force a subordination upon KeyBank to which it never agreed.

The balance of Appellant's reformation argument contains no actual legal analysis. Instead, Appellant provides it's *opinion* as to why KeyBank may have entered into a subordination agreement and why, despite the express language in the agreement and the uncontested testimony of KeyBank's representative, subordination agreements are no more than formulaic contracts, and the actual parties to them have no bearing whatsoever on their enforceability against the subordinating lien holder. Again, this is no more than an unsupported statement of opinion, unsupported by the law or the facts of this case.

In light of all of the above, absolutely no grounds whatsoever exist that would justify the reformation of the subordination agreement. The agreement accurately sets forth the terms of the contract between New Century and KeyBank. To reform the document as requested by Appellant would not serve to correct a mistake, but would, instead, serve to create a new obligation between KeyBank and Appellant.

II. ***Because KeyBank Made Absolutely No Representations To Appellant During The Negotiation And Execution Of The Subordination Agreement, Appellant May Not Rely On The Doctrine Of Estoppel.***

Appellant next argues that it should be allowed to take advantage of the doctrine of equitable estoppel to stop KeyBank from claiming that its mortgage is first in priority. Again, neither the law nor the facts support this argument.

KeyBank, generally, agrees with the law cited by Appellant with regard to the doctrine of equitable estoppel. In order to take advantage of the doctrine, Appellant must demonstrate:

> ***7** (1) that the party knowingly made a false representation or concealment of a material fact (or at least took a position contrary to that now taken); (2) that the misrepresentation must be made in a misleading manner with the intention or expectation that another would rely on it to act; (3) that the plaintiff actually relied on the representation; and (4) that plaintiff relied to his detriment so much that unless the parties are stopped from asserting the truth or a contrary position, plaintiff would suffer loss. [citations omitted.]

Andres v. Perrysburg (1988), 47 Ohio App. 3d 51, 56. KeyBank must point out that Appellant's Brief quotes this same passage, but adds the phrase "(or innocently)" to the first sentence of the above quote. This phrase *does not* appear in the original quotation. KeyBank maintains that, even if Appellant had intended for this phrase to be in brackets as opposed to parenthesis, it makes a significant change to the actual holding of this case. Although *First Federal Savings and Loan Association v. Perry's Landing, Inc.* (1983), 11 Ohio App. 3d 135, (discussed by Appellant subsequent to the *Andres* case) does contain language dealing with the question of an "innocent representation", that language is not contained in the *Andres* case, a case decided by the same Court of Appeals five years later than *Perry's Landing*.

Appellant's equitable estoppel argument must fail for two reasons. First, KeyBank made no representation whatsoever to Appellant. As set forth in the Affidavit of KeyBank's representative filed in support of its Motion for Summary Judgment, KeyBank had no knowledge at the time it executed the subordination agreement with New Century that Appellant would ever be involved with this matter. As such, any representations made by Plaintiff/Appellant were made to New Century, and any reliance made upon those representations by Appellant was patently unreasonable.

The second reason Appellant's equitable estoppel argument is without merit is the fact that KeyBank is not asserting a position inconsistent with its prior ***8** representations, to whomever they may have been made. KeyBank representations were crystal clear and spelled out in detail in the subordination agreement. KeyBank agreed to subordinate its interest to that of New Century Mortgage. The contractual language with regard to modifications of the contract mentioned above clearly indicates that this agreement was specifically between KeyBank and New Century. As such, there has been no misrepresentation on the part of KeyBank, whether innocent or not.

For these reasons, Appellant's equitable estoppel argument must fail. Appellant is essentially attempting to take a very clear contract with well-defined terms *and parties* and change it by the use of equitable principles. Moreover, the representations made by KeyBank were clear and unequivocal. KeyBank agreed to subordinate its mortgage to the interest of New Century. Contrary to Appellant's positions, KeyBank did not agree or represent to anyone that it would subordinate its position to any party for any length of time. In light of these factors, Appellant's equitable estoppel argument is without merit.

III. ***The Equities In This Case Do Not Favor The Application Of The Doctrine Of Equitable Subrogation On Behalf Of Appellant.***

Appellant next argues that under the doctrine of equitable subrogation, its mortgage should be first in priority. While Appellant breaks its equitable subrogation argument into four sub-arguments, the argument is based on two basic, if flawed, premises. The first is that, because KeyBank originally bargained for a second position and subsequently agreed to subordinate its interest

to that of New Century, KeyBank is stuck in a second position to any subsequent refinancing lender for an indefinite period of time. According to Appellant this is true regardless of any **neglect** or failure to protect itself on the part of the refinancing lender (in this case Appellant). Appellant also argues ***9** that it is entitled to benefit from the doctrine of equitable subrogation because the error in this case was not the result of its own **neglect**, but rather that of the title insurance company, NETCO. Again, it is Appellant's position that it has absolutely no duty to protect its own interests.

In August, 2010, the Ohio Supreme Court revisited the issue of equitable subrogation in *ABN AMRO Mortgage Group. Inc. v. Kangah* (2010), 126 Ohio St.3d 425. In *Kangah* the Supreme Court reviewed the history of the doctrine of equitable subrogation, but broke little new ground. Instead the Court reiterated the concept that "the application of equitable subrogation depends upon the facts and circumstances of each case . . . ." *Id*. at 428. *Kangah* is instructive in the present case as it relates to the arguments being set forth by Appellant. First, Appellant maintains that the "majority view" in Ohio is that the error of a title insurance company cannot be imputed to the lender. Appellant argues that this "majority view" is contradicted in only two districts, the Ninth and the Eleventh. As will be demonstrated below, there is most definitely case law from other districts that does contradict this alleged majority view. It may be more instructive to examine the facts of the Ohio Supreme Court's decision in *Kangah*. Therein, the lender refinanced an outstanding obligation. However, one existing mortgage was not released by the refinancing. According to the Supreme Court, this is because, "inexplicably, ABN's title examiner did not discover the CCDOD mortgage, and that lien was not extinguished in the refinancing". *Id*. at 426. As is true in the present case, ABN argued that the negligence of its title company should not be imputed to ABN. Ultimately, the Supreme Court weighed the equities and determined that ABN could not take advantage of the doctrine of equitable subrogation to advance ***10** its mortgage in priority over that of the former junior lienholder. *Id*. at 429. In light of this ruling, Appellant's contention that the "majority view" in Ohio is that a title insurance company's negligence cannot be imputed to the lender is false.

KeyBank maintains that the Supreme Court's reiteration of the fact that equitable subrogation cases should be decided on a case-by-case basis would send one in search of cases with similar fact patterns to that of the case at hand. A very similar case from the Tenth District Court of Appeals (and apparently not counted in Appellant's poll of Ohio appellate courts) is *KeyBank. N.A. v. Adams* (Dec. 11, 2003), Franklin Co. App. No. 02AP-1293, unreported. In *Adams*, a party claiming the application of the doctrine of equitable estoppel (GMAC) was aware of the existence of a second mortgage, instructed the title company to obtain a subordination agreement from the holder of the second mortgage, believed the subrogation agreement had been obtained, and paid off the first mortgage. However, a subordination agreement was never reached between KeyBank and GMAC. The Court of Appeals stated that the doctrine of equitable subrogation did not apply because GMAC was in the best position to protect its own interests and failed to do so by obtaining the subordination prior to the closing of the loan. A similar situation arose in the Twelfth District (again unnoticed by Appellant) in *Chase Manhattan Bank v. Westin* (Sept. 29, 2003), Clermont Co. Appeals No. CA2002-12-099, unreported. In *Westin* a number of mortgages were involved. Some of those mortgages were subordinated while others were not. Subsequently, when Chase Manhattan argued that it believed that all of the mortgages had been subordinated, and made its loan based upon that belief, the Court held:

> Here, Chase relied upon the "incorrect and uninformed assumption" that Northside would subrogate its mortgage liens to Chase's new ***11** mortgage. Chase never verified with Northside that Chase would retain priority after paying off loans three and four. Chase was in complete control of the loan process and therefore could have protected its own interests. The mistake rests solely with Chase.

Id. It should be noted that in both *Adams* and *Westin* third party agents, i.e., title companies, were involved in the transaction.

KeyBank contends that this situation is similar to the above cases. KeyBank did not negotiate with Saxon Mortgage to subordinate its mortgage to Saxon's. In fact it appears that Saxon simply made an "incorrect and uninformed assumption" that KeyBank's subordination agreement with New Century Mortgage could somehow be assumed by Saxon without KeyBank's consent. KeyBank is not aware of any legal theory under which this might be true. Further, there can be no question that Saxon was at all times in complete control of the loan process in this matter and could have protected its own interests by at least

attempting to obtain a subordination agreement from KeyBank prior to lending any funds to the Golubs. As in *Westin*, the mistake rests solely on Appellant and equitable subrogation will not provide Appellant any relief from its own error.

As mentioned above, the application of the doctrine of equitable subrogation must be decided on a case-by-case basis. In cases factually most similar to the case at hand, the Appellate Courts of Ohio have refused to apply the doctrine. KeyBank contends that this Court should do so as well.

KeyBank believes it is also appropriate to address the "economic basis" for application of the doctrine of equitable subrogation as argued by Appellant. Appellant argues that the losses and costs associated with imputing the negligence of the title agency to the lender, or conversely requiring the lender to take on the "traditional" role ***12** of title companies, will have the negative impact of being passed on to the bank's customers. This argument completely ignores one factor: title insurance. As KeyBank argued in the trial court, it seems the height of hypocrisy for a "lender" to argue that the title insurance company is the one who made mistake and that Appellant will be damaged if not relieved of the mistake by equity. Said hypocrisy is based on the fact that, as is generally the case, the *title insurance company* is the one making that argument. The fact of the matter is the number of cases in which the lender will actually suffer a negative economic impact due to mistakes such as that made in this case would seem to be negligible. In fact, it would appear that the only parties regularly benefiting from the application of equitable principles to obviate these mistakes are the parties who, as often as not, ultimately made the mistake in the first place.

KeyBank contends that the Ohio Supreme Court agrees with this interpretation. In *Kangah* the Court made the following statement:

> ABN would not be seeking equitable subrogation but for someone's negligence. That circumstance alone was enough to defeat equitable subrogation in *Jones*, 61 O. St. 2d 203, remaining citations omitted. Whether ABN or the title insurance company it employed was negligent is uncertain. If the title insurance company was negligent, ABN may have a claim against it for its loss, *negating its need for equitable subrogation*. CCDOD has no claim against ABN.

ABN AMRO Mortgage Group. Inc. v. Kangah, 126 O. St. 3d at 428. KeyBank vigorously maintains that the exact same situation applies here. Appellant goes to great lengths to demonstrate that the negligence in this case was that of the title insurance company. As such, KeyBank maintains that Appellant's relief lies with the title insurance company. Because Appellant has that avenue of relief, the application of the doctrine of equitable subrogation is not required in this case.

***13** In light of all of the above factors, Appellant's arguments with regard to equitable subrogation are baseless. Therefore, the trial court's decision should be affirmed.

IV. *KeyBank Was Not Unjustly Enriched In This Matter.*

Appellant's final assignment of error argues that KeyBank was unjustly enriched in this transaction. "Unjust enrichment arises where the receipt by one person from another of a benefit and the retention of that benefit would be unjust." *Katz v. Banning* (1992), 84 Ohio App. 3d 543, 552, citing *McClanahan v. McClanahan* (1946), 79 Ohio App. 231, 233, and *Hummel v. Hummel* (1938), 133 Ohio St. 520, 528. Further, "[i]t is not sufficient for the [plaintiffs] to show that [they have] conferred a benefit upon the [defendants]. [Plaintiffs] must go further and show that under the circumstances [they have] a superior equity so that, as against [them], it would be unconscionable for the [defendants] to retain the benefit." *Katz v. Banning* (1992), 84 Ohio App. 3d at 552, quoting from *Cincinnati v. Fox* (1943), 71 Ohio App. 233, 239.

Appellant argues that the difference between this case and other, similar, cases is that in this case KeyBank received a $150.00 (One-hundred fifty dollar) payment in consideration for the subordination agreement with New Century. Appellant opines that the receipt of this consideration, somehow, changes the equities in this case and forgives Appellant for its own negligence.

KeyBank first points out that Appellant did not pay the above-mentioned fee to KeyBank. The HUD-1 statement attached to the affidavit of Tricia Roth (submitted in support of Appellant's Motion for Summary Judgment) clearly indicates that the subordination fees were charged to Robert Golub and paid to NETCO. As such, it is ***14** abundantly clear that Appellant did not confer this "benefit" upon KeyBank. Therefore, Appellant may certainly not claim that it unjustly enriched KeyBank.

Next, KeyBank maintains that there was not nothing "unjust" about its receipt of the payment. KeyBank delivered exactly what was asked of it, i.e., a subordination agreement to New Century. The fact that New Century ultimately did not make a loan to the Golubs and the subordination agreement went unused is not relevant to the issue of unjust enrichment. KeyBank delivered what it agreed to deliver, and any payment received for that service is not "unjust."

Finally, KeyBank maintains that Appellant cannot demonstrate a superior equity in this matter, whether discussing the issue of the subordination payment or KeyBank's retention of a first mortgage. The equities in this matter were discussed in detail above, and KeyBank will not repeat that discussion. However, it is sufficient to say that Appellants complaints are the result of its own actions or inaction.

In light of these factors KeyBank contends that it was not unjustly enriched by any alleged benefit conferred by any party in this matter. As such the trial court's decision should be affirmed.

CONCLUSION

The trial court's decision should be affirmed. Appellant is simply asking this Court to invoke its equitable powers to correct a mistake caused by Appellant's own **neglect**. Whether the requested remedy is reformation, equitable estoppel, equitable subrogation or unjust enrichment, the Appellant must demonstrate that its equity is strong. As demonstrated herein, the equities do not, at any point in this transaction, favor Appellant.

***15** With this in mind, the deciding factor in this case must be R.C. §5301.23, the first in time rule. There is no dispute that KeyBank's mortgage was recorded prior to that of Appellant. Therefore, KeyBank's mortgage must be give priority.

In light of these factors it is clear that the trial court committed no error in this case. As such, its decision should be affirmed.

Appendix not available.

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