

**COURT OF APPEALS
DECISION
DATED AND FILED**

August 3, 2011

A. John Voelker
Acting Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2010AP2359

Cir. Ct. No. 2009CV3590

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

**COMMUNITY BANK & TRUST, A/K/A COMMUNITY BANK-CORP OF
SHEBOYGAN, INC.,**

PLAINTIFF-APPELLANT,

V.

BRADLEY PELZEK AND LISA PELZEK,

DEFENDANTS,

CITIMORTGAGE, INC.,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Waukesha County:
MICHAEL O. BOHREN, Judge. *Affirmed.*

Before Brown, C.J., Neubauer, P.J., and Reilly, J.

¶1 PER CURIAM. Community Bank & Trust, a/k/a Community Bank-Corp of Sheboygan, Inc. appeals from the summary judgment granted to Citimortgage, Inc. Community Bank argues that the circuit court erred when it determined that Citimortgage is entitled to equitable subrogation and that Community Bank was not a good faith purchaser under WIS. STAT. § 706.08 (2009-10).¹ We conclude that summary judgment was properly granted, and we affirm the judgment of the circuit court.

¶2 This is a dispute about which mortgage lien has first priority. In 2004, the property owners took out a mortgage loan from Fairway Independent Mortgage Corporation. In January 2008, the property owners refinanced their principal mortgage with Citimortgage. The property owners agreed that the mortgage they gave to Citimortgage would be a first priority lien. Citimortgage disbursed the funds to pay off the Fairway loan. Shortly afterwards, the property owners obtained a home equity loan from Community Bank, which was executed on February 15, 2008. Community Bank recorded its lien on the property on March 12, 2008. Citimortgage's lien was not recorded until March 19, 2008. In 2009, Community Bank brought a foreclosure action against the property owners and alleged that Citimortgage's interest was subordinated to its interest. Both Community and Citimortgage moved the circuit court for summary judgment.

¶3 Community Bank argued that its lien was recorded first and, therefore, it took priority over Citimortgage's lien. The circuit court, however, determined that Community Bank knew that Citimortgage had loaned money to

¹ All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

the property owners at the time Community Bank executed the equity loan to them. The court also considered that Community Bank knew when it executed the home equity loan that there was a first mortgage on the property. The circuit court determined that the reasonable inference was that the obligation to Citimortgage was a mortgage. The court went on to determine that since Community Bank had constructive notice of the Citimortgage loan, it had a duty to investigate what the status of that obligation was. Community Bank did not investigate. The court concluded that under these circumstances, the doctrine of equitable subrogation applied. The court granted summary judgment to Citimortgage and denied it to Community Bank.

¶4 Community Bank argues on appeal that the circuit court erred as a matter of law when it granted summary judgment to Citimortgage. Citimortgage responds that it is equitably subrogated to the first priority lien position because the first mortgage was paid off with the proceeds from its loan. It also argues that Community Bank was not a good faith purchaser. Because we conclude that this determination controls the outcome of this appeal, we consider first whether the doctrine of equitable subrogation applies.

¶5 Our review of the circuit court's decision to grant summary judgment is de novo. *Green Spring Farms v. Kersten*, 136 Wis. 2d 304, 315-17, 401 N.W.2d 816 (1987). Summary judgment must be granted if the evidence demonstrates "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." *Id.* at 315 (quoting WIS. STAT. § 802.08(2)).

¶6 "Subrogation is an equitable doctrine invoked to avoid unjust enrichment, and may be properly applied whenever a person other than a mere

volunteer pays a debt which in equity and good conscience should be satisfied by another.” *Ocwen Loan Servicing, LLC. v. Williams*, 2007 WI App 229, ¶7, 305 Wis. 2d 772, 741 N.W.2d 474 (citation omitted). A lender is entitled to equitable subrogation based on agreement between the parties that the lender will have security. *Id.*, ¶14. “[A] lender will be granted subrogation where money is advanced in reliance upon a justifiable expectation that the lender will have security equivalent to that which his advances have discharged.” *Rock River Lumber Corp. v. Universal Mortg. Corp.*, 82 Wis. 2d 235, 241, 262 N.W.2d 114 (1978) (citation omitted). Subrogation is available when “a definite agreement of the parties is shown and where a balancing of the equities favors application of the doctrine.” *Id.* at 242.

¶7 Citimortgage paid off an existing first priority mortgage lien with the expectation that it would also have a first priority lien. Further, Community Bank expected that the loan it executed would be secured by a second priority mortgage lien. It was right there in black and white. We agree with the circuit court that using the doctrine of equitable subrogation in this case has the effect of putting the parties in the positions they expected to be when they agreed to loan money to the property owners. A balancing of the equities supports the circuit court’s determination that Citimortgage was entitled to equitable subrogation.

¶8 Community Bank argues that the doctrine should not apply because Citimortgage did not timely record its lien, and therefore, Citimortgage does not have “clean hands.” If Citimortgage’s lien had been filed earlier, however, then Citimortgage would clearly have had the first priority, and a court would not have had to consider equities of the situation. The doctrine necessarily comes into play because there has been some negligence by the party seeking such relief. *See Iowa Cnty. Bank v. Pittz*, 192 Wis. 83, 91-92, 211 N.W. 134 (1927). The fact that

Citimortgage's lien was not recorded first does not preclude Citimortgage from receiving equitable subrogation.

¶9 Because we conclude that Citimortgage is entitled to equitable subrogation, we need not address Community Bank's argument that it was a good faith purchaser under WIS. STAT. § 706.08.

By the Court.—Judgment affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5.

