

2009 Ohio 359, *; 2009 Ohio App. LEXIS 300, **

ABN AMRO MORTGAGE GROUP, INC., PLAINTIFF-APPELLEE vs. JACOB KANGAH, ET AL., DEFENDANTS-APPELLEES; CUYAHOGA COUNTY BOARD OF COMMISSIONERS, DEPARTMENT OF DEVELOPMENT, DEFENDANT-APPELLANT

No. 91401

COURT OF APPEALS OF OHIO, EIGHTH APPELLATE DISTRICT, CUYAHOGA COUNTY

2009 Ohio 359; 2009 Ohio App. LEXIS 300

January 29, 2009, Released

PRIOR HISTORY: [1]**

Civil Appeal from the Cuyahoga County Court of Common Pleas. Case No. CV-606632.

DISPOSITION: AFFIRMED.

CASE SUMMARY

PROCEDURAL POSTURE: Appellant, a county board of commissioners, department of development (CCDOD), sought review of a decision from the Cuyahoga County Court of Common Pleas (Ohio), which determined that a mortgage held by appellee refinancing mortgagee (RM) had priority over the CCDOD's mortgage. The matter arose in the RM's foreclosure action, wherein the CCDOD cross-claimed for a determination that it had a first and best lien under [R.C. 5301.23](#).

OVERVIEW: A mortgagor executed a promissory note to an initial mortgagee, which was secured by a mortgage on the property. He also executed a promissory note to the CCDOD that was secured by a mortgage on the property. Both mortgages were recorded on the same date, although the CCDOD was specifically recorded as the subordinate security instrument. When the mortgagor refinanced the property, the RM required a mortgage that would be the first and best lien on the property. A title search revealed the initial mortgage, which was paid off with the loan proceeds, but the CCDOD mortgage was not identified at that time. Thereafter, the RM filed the foreclosure action, and the CCDOD asserted priority on its lien under [§ 5301.23](#). The trial court determined that the RM had priority. On appeal, the court agreed with the priority determination based on the doctrine of **equitable subrogation**. The RM had intended to hold the first and best lien, the CCDOD agreed to its subordinate security interest, the title search error was a mere mistake, and the CCDOD was not prejudiced by its inferior position. Further, the RM was not unjustly enriched in the circumstances.

OUTCOME: The court affirmed the decision of the trial court.


CORE TERMS: mortgage, equitable subrogation, recorded, summary judgment, unjust enrichment, discover, subordinate, mortgage lien, real estate, announcement,

mortgagee, municipal, purchaser, validly, general rule, assignment of error, nonmoving party, express agreement, preexisting, promissory note, loan proceeds


LEXISNEXIS® HEADNOTES


 [Hide](#)

[Civil Procedure](#) > [Summary Judgment](#) > [Appellate Review](#) > [Standards of Review](#) 


[Civil Procedure](#) > [Summary Judgment](#) > [Standards](#) > [General Overview](#) 

[Civil Procedure](#) > [Appeals](#) > [Standards of Review](#) > [De Novo Review](#) 

HN1  An appellate court reviews a trial court's grant of summary judgment de novo. Before summary judgment may be granted, a court must determine that: (1) no genuine issue as to any material fact remains to be litigated, (2) a moving party is entitled to judgment as a matter of law, and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing the evidence most strongly in favor of the nonmoving party, that conclusion is adverse to the nonmoving party. [More Like This Headnote](#)


[Real Property Law](#) > [Financing](#) > [Secondary Financing](#) > [Lien Priorities](#) 

[Real Property Law](#) > [Priorities & Recording](#) > [General Overview](#) 

HN2  **R.C. 5301.23** sets forth the general rule that the first mortgage that is presented and recorded has preference over a subsequently presented and recorded mortgage. The priority of a mortgage is determined by reviewing the recording chronology. In some circumstances, the doctrine of **equitable subrogation** can overcome the general statutory rule. **Equitable subrogation** arises by operation of law when one having a liability or right or a fiduciary relation in the premises pays a debt by another under such circumstances that he is in equity entitled to the security or obligation held by the creditor whom he has paid. In order to be entitled to **equitable subrogation**, the equity must be strong and the case clear. [More Like This Headnote](#)

[Real Property Law](#) > [Financing](#) > [Secondary Financing](#) > [Lien Priorities](#) 


[Real Property Law](#) > [Priorities & Recording](#) > [General Overview](#) 

HN3  Under the **equitable subrogation** doctrine, a third party who, with its own funds, satisfies and discharges a prior first mortgage on real estate, upon express agreement with an owner that it will be secured by a mortgage on that real estate, is subrogated to all of the rights of the first mortgagee in that real

estate. Therefore, if the parties intended, a mortgagee who satisfies the first mortgage steps into the shoes of the first mortgagee. Nevertheless, some courts have not applied the doctrine of **equitable subrogation**, even when the party intended to hold the first and best lien. [More Like This Headnote](#)


[Real Property Law](#) > [Financing](#) > [Secondary Financing](#) > [Lien Priorities](#) 


[Real Property Law](#) > [Priorities & Recording](#) > [General Overview](#) 


HN4  Some courts have not applied the doctrine of **equitable subrogation** when a party is negligent in its business practices (i.e., failing to record the mortgage lien in a timely fashion), and the party is in the best position to protect its interest, or when the title company fails to discover a preexisting and validly recorded mortgage, in essence, eliminating the doctrine altogether. [More Like This Headnote](#)

[Real Property Law](#) > [Financing](#) > [Secondary Financing](#) > [Lien Priorities](#) 


[Real Property Law](#) > [Priorities & Recording](#) > [General Overview](#) 

HN5  Several courts allow **equitable subrogation** when a party mistakenly fails to discover a preexisting and validly recorded mortgage. **Equitable subrogation** is applied to prevent fraud and relief from mistakes. [More Like This Headnote](#)


[Contracts Law](#) > [Remedies](#) > [Equitable Relief](#) > [Quantum Meruit](#) 

[Real Property Law](#) > [Financing](#) > [Secondary Financing](#) > [Lien Priorities](#) 

[Real Property Law](#) > [Priorities & Recording](#) > [General Overview](#) 

HN6  **Equitable subrogation** is not limited to or by the concept of unjust enrichment. Unjust enrichment occurs when a person has and retains money or benefits which in justice and in equity belong to another. In the mortgage context, the doctrine of **equitable subrogation** is strictly confined to situations when those who furnish or advance the purchase money to a purchaser in such a manner that they can be said either to have paid it to the vendor personally, or caused it to be paid on behalf of and for the benefit of the purchaser, and to this extent they become parties to the transaction. It must not be a general loan to be used by the purchaser to pay the consideration of the purchase, or to be used for any other purpose at his pleasure. [More Like This Headnote](#)

[Real Property Law](#) > [Financing](#) > [Secondary Financing](#) > [Lien Priorities](#) 

HN7  A title company's negligence is not material in cases in which a competing lienholder is not misled or injured because it did not bargain for or expect a first lien position. [More Like This Headnote](#)

COUNSEL: FOR APPELLANT: William D. Mason, Cuyahoga County Prosecutor, By: Kelli Kay Perk, Assistant Prosecuting Attorney, Cleveland, Ohio.

For ABN AMRO Mortgage Group, Inc., APPELLEE: Ann Marie Johnson, Michael T. Huff, Danielle Konrad Pitcock, Lee R. Schroeder, Michael J. Sikora, III, Mentor, Ohio; Christian E. Niklas, Shapiro & Felty, Cleveland, Ohio.

For Jacob Kangah, et al., APPELLEE: Kenneth J. Freeman, Kenneth J. Freeman Co., L.P.A., Cleveland, Ohio.

For Navy Federal Credit Union, APPELLEE: Paul M. Nalepka, Cincinnati, Ohio.

JUDGES: BEFORE: Gallagher, P.J., [Boyle](#) , J., and [Sweeney](#) , J. [MARY J. BOYLE](#) , J., and [JAMES J. SWEENEY](#) , J., CONCUR.


OPINION BY: SEAN C. GALLAGHER

OPINION

JOURNAL ENTRY AND OPINION

N.B. This entry is an announcement of the court's decision. See [App.R. 22\(B\)](#), [22\(D\)](#) and [26\(A\)](#); [Loc.App.R. 22](#). This decision will be journalized and will become the judgment and order of the court pursuant to [App.R. 22\(E\)](#) unless a motion for reconsideration with supporting brief, per [App.R. 26\(A\)](#), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin **[**2]** to run upon the journalization of this court's announcement of decision by the clerk per [App.R. 22\(E\)](#). See, also, [S.Ct. Prac.R. II, Section 2\(A\)\(1\)](#).

SEAN C. GALLAGHER, P.J.:

[*P1] Defendant-appellant, Cuyahoga County Board of Commissioners, Department of Development (hereafter "CCDOD"), appeals the decision of the Cuyahoga County Court of Common Pleas, which determined that the mortgage held by plaintiff-appellee, [ABN AMRO !\[\]\(fe3aebe81acea8d45108cd2768939da7_img.jpg\)Mortgage Group, Inc.](#)  (hereafter "ABN"), had priority over CCDOD's mortgage. For the reasons that follow, we affirm.

[*P2] On July 5, 2000, Jacob Kangah executed a promissory note with First Ohio Mortgage Corporation ("First Ohio") for \$ 68,916 that was secured by a mortgage on the property at 20617 Libby Road in Maple Heights, Ohio. In addition, Kangah executed a promissory note with CCDOD in the amount of \$ 7,500, which was also secured by a mortgage on the same property.

[*P3] Both mortgages were recorded on July 12, 2000, with the CCDOD mortgage specifically referred to and recorded as the subordinate security instrument. That same day, the First Ohio mortgage was assigned to Countrywide Home Loans, Inc. ("Countrywide").

[*P4] In May 2001, Kangah applied for a loan with ABN to refinance **[**3]** his property. In order to secure the loan, ABN required Kangah and his wife to execute a mortgage that would be the first and best lien on the property. ABN retained First Class Title Agency, Inc. ("First Class") to perform a title search and the closing. First Class identified the First Ohio mortgage but not the CCDOD mortgage. A payoff statement was requested from Countrywide for the First Ohio mortgage.

[*P5] On June 12, 2001, Kangah received loan proceeds totaling \$ 77,000 from ABN, which were secured by a mortgage on the property. The ABN mortgage was recorded on June 19, 2001. The loan proceeds were used to pay off the First Ohio mortgage, outstanding property taxes, and the fees and costs associated with the transaction.

[*P6] On November 7, 2001, the First Ohio mortgage was released of record due to satisfaction of the mortgage.

[*P7] On November 8, 2006, ABN filed a complaint for money judgment, foreclosure, and relief. On December 4, 2006, CCDOD filed its answer and cross-claim, alleging to have the first and best lien on the property.

[*P8] In August 2007, ABN moved for summary judgment as to the priority of its mortgage interest. The matter was stayed because Kangah filed a Chapter 13 bankruptcy **[**4]** petition. When the case was reactivated, CCDOD filed a brief in opposition.

[*P9] The magistrate granted summary judgment in favor of ABN on March 31, 2008, with decision to follow. In the meantime, on April 8, 2008, the trial court granted summary judgment in favor of ABN "based on the doctrine of **equitable subrogation**," finding that ABN had paid the first mortgage lien and taxes when Kangah refinanced the property and that CCDOD held a subordinate mortgage. The court indicated "no just cause for delay." On April 15, 2008, the magistrate filed her decision. CCDOD filed a motion to clarify (asking which was the final order), then objections to the magistrate's decision, and finally a notice of appeal.

[*P10] CCDOD advances one assignment of error for our review, which states the following:

[*P11] "The trial court erred when it granted Appellee [ABN AMRO Mortgage Group Inc.](#)'s motion for partial summary judgment on the issue of lien priority."

[*P12] ^{HN1} This court reviews a trial court's grant of summary judgment de novo. [Ekstrom v. Cuyahoga Cty. Community College, 150 Ohio App.3d 169, 2002 Ohio 6228, 779 N.E.2d 1067](#). Before summary judgment may be granted, a court must determine that "(1) no genuine issue as to any material fact **[**5]** remains to be litigated, (2) the moving party is entitled to judgment as a matter of law, and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing the evidence most strongly in favor of the nonmoving party, that

conclusion is adverse to the nonmoving party." [State ex rel. Dussell v. Lakewood Police Dept.](#), 99 Ohio St. 3d 299, 300-301, 2003 Ohio 3652, 791 N.E.2d 456, citing [State ex rel. Duganitz v. Ohio Adult Parole Auth.](#), 77 Ohio St. 3d 190, 191, 1996 Ohio 326, 672 N.E. 2d 654.

[*P13] CCDOD argues that the doctrine of **equitable subrogation** does not apply in this case because ABN failed to discover a validly recorded prior mortgage. CCDOD contends that the general rule "first in time, first in right" applies in this case.

[*P14] ABN argues that the doctrine of **equitable subrogation** applies because ABN satisfied the First Ohio mortgage, which had priority over the CCDOD mortgage. In addition, it was ABN's intent to hold the first and best lien on the property, while it was CCDOD's intent to hold a subordinate lien.

[*P15] ^{HN2} [R.C. 5301.23](#) sets forth the general rule that the first mortgage that is presented and recorded has preference over a subsequently presented and recorded mortgage. The priority **[**6]** of a mortgage is determined by reviewing the recording chronology. [Wash. Mut. Bank, FA v. Aultman](#), 172 Ohio App.3d 584, 2007 Ohio 3706, 876 N.E.2d 617.

[*P16] In some circumstances, the doctrine of **equitable subrogation** can overcome the general statutory rule. [Id.](#) at 589-590. **Equitable subrogation** "arises by operation of law when one having a liability or right or a fiduciary relation in the premises pays a debt by another under such circumstances that he is in equity entitled to the security or obligation held by the creditor whom he has paid." [State v. Jones](#) (1980), 61 Ohio St.2d 99, 102, 399 N.E.2d 1215, quoting [Federal Union Life Ins. Co. v. Deitsch](#) (1934), 127 Ohio St. 505, 510, 189 N.E. 440, 39 Ohio L. Rep. 653. In order to be entitled to **equitable subrogation**, "the equity must be strong and [the] case clear." [Jones](#), 61 Ohio St.2d at 102.

[*P17] In other words, ^{HN3} a third party who, with its own funds, satisfies and discharges a prior first mortgage on real estate, upon express agreement with the owner that it will be secured by a mortgage on that real estate, is subrogated to all of the rights of the first mortgagee in that real estate. [Deitsch](#), 127 Ohio St. at [paragraph one of the syllabus](#). Therefore, if the parties intended, a mortgagee who satisfies the first **[**7]** mortgage steps into the shoes of the first mortgagee.

[*P18] Nevertheless, some courts have not applied the doctrine of **equitable subrogation**, even when the party intended to hold the first and best lien. For instance, two districts have not applied the doctrine of **equitable subrogation** when the party actually knew of the competing lien and failed to take adequate steps to protect its interest. See [Keybank Natl. Ass'n. v. Adams](#), Franklin App. No. 02AP-1293, 2003 Ohio 6651 (10th Dist.); [Fifth Third Bank v. Lorange](#), App. No. CA2006-10-280, 2007 Ohio 4217 (12th Dist.).

[*P19] ^{HN4} Some courts have not applied the doctrine of **equitable subrogation** when the party is negligent in its business practices (i.e., failing to record the mortgage lien in a timely fashion), and the party is in the best position to protect its interest. See [Old Republic Natl. Title Ins. Co. v. Fifth Third Bank](#), Hamilton App. No. C-070567, 2008 Ohio 2059 (1st Dist.); [State Savings Bank v. Gunther](#) (1998), 127 Ohio App. 3d 338, 713 N.E.2d 7 (3rd Dist.); [Huntington Natl. Bank v. Allgier](#), Wood App. No. WD07-061, 2008 Ohio 1289 (6th Dist.).

[*P20] Also, two districts have declined to apply the doctrine of **equitable subrogation** when the title company failed to **[**8]** discover a preexisting and validly recorded mortgage, in essence, eliminating the doctrine altogether. See [Leppo, Inc. v. Keifer \(Jan. 31, 2001\), Summit App. Nos. 20097, 20105, 2001 Ohio App. LEXIS 293 \(9th Dist.\)](#); [Assocs. Financial Servs. Corp. v. Miller \(2002\), 2002 Ohio 1610 \(11th Dist.\)](#), .

[*P21] ^{HN5} Still several courts allow **equitable subrogation** when the party mistakenly failed to discover a preexisting and validly recorded mortgage. See [Aultman, supra \(2nd Dist.\)](#); [Federal National Mortgage Assn. v. Webb, Morrow App. No. 2005CA0013, 2006 Ohio 3574 \(5th Dist.\)](#); [The Cadle Co. No. 2 v. Rendezvous Realty \(Sept. 2, 1993\), Cuyahoga App. Nos. 63565, 63724, 1993 Ohio App. LEXIS 4261](#); [Wash. Mutual Bank v. Hopkins, Franklin App. No. 07AP-320, 2007 Ohio 7008 \(10th Dist.\)](#). These courts have followed the Ohio Supreme Court's decision in *Jones*, which explained that **equitable subrogation** is applied to prevent fraud and relief from mistakes. [Jones, 61 Ohio St.2d 99, 399 N.E.2d 1215](#).

[*P22] In the case at hand, we find that the doctrine of **equitable subrogation** applies because ABN intended to hold the first and best lien on the property, CCDOD agreed to its subordinate security interest, ABN's title company's failure to discover CCDOD's mortgage lien was a mere **[**9]** mistake, and CCDOD was not prejudiced by its inferior position.

[*P23] Next, CCDOD argues that the doctrine of **equitable subrogation** cannot be applied to a political subdivision. ABN argues that this issue was waived because CCDOD failed to raise the issue below. We disagree. Although, not ruled upon, CCDOD asserted this argument in the objections to the magistrate's decision.

[*P24] CCDOD asserts that because **equitable subrogation** is essentially a theory of unjust enrichment, it does not apply. CCDOD cites to [Cooney v. City of Independence \(Nov. 23, 1994\), Cuyahoga App. No. 66509, 1994 Ohio App. LEXIS 5290](#), for its position. Specifically, CCDOD relies on this court's statement that "it has been said that a municipal corporation would not be liable upon quasi or implied contracts or for claims based upon theories of quantum meruit or unjust enrichment." Id., citing [Cuyahoga Falls v. Ashcraft \(Dec. 26, 1991\), Summit App. No. 15129, 1991 Ohio App. LEXIS 6376](#).

[*P25] This statement is taken out of context and does not stand for the proposition that **equitable subrogation** cannot apply to a political subdivision. In [Cooney, supra](#), the plaintiff tried to enforce an oral employment contract against the city. The trial court dismissed the case for failure to state **[**10]** a claim. Id. This court affirmed the trial court's decision, citing [Ashcraft, supra](#). [Cooney, supra](#). In [Ashcraft, supra](#), the court explained as follows: "[a]s a check against misuse of city authority by local officials, procedural safeguards have been adopted which govern the creation of public obligations and liabilities. Generally, municipalities may not be bound to a contract unless the agreement is formally ratified through proper channels. [Wellston v. Morgan \(1901\), 65 Ohio St. 219, 62 N.E. 127](#), paragraph three of the syllabus; [Seven Hills v. Cleveland \(1988\), 47 Ohio App.3d 159, 161-163, 547 N.E.2d 1024](#). As a result, a claim may not be sustained against a municipal corporation upon theories of implied or quasi-contract. [Montz Sales & Service, Inc. v. Barberton \(1983\), 10 Ohio App.3d 157, 158, 10 Ohio B. 209, 460 N.E.2d 1159](#); see 21 Ohio Jurisprudence 3d (1980) 371, Counties Townships, and Municipal Corporations, Section 809. Only express agreements adopted by the City in

accordance with law may be enforced." Cooney failed to state a claim because he did not have a written employment contract. [Cooney, supra.](#)

[*P26] The *Cooney* case is wholly inapplicable to the case at hand. Although **equitable subrogation** has been called "a **[**11]** theory of unjust enrichment," we agree with ABN that ^{HN6} **equitable subrogation** is not limited to or by the concept of unjust enrichment. Unjust enrichment occurs when a person has and retains money or benefits which in justice and in equity belong to another. [Johnson v. Microsoft Corp., 106 Ohio St.3d 278, 2005 Ohio 4985, 834 N.E.2d 791.](#) In the mortgage context, the doctrine of **equitable subrogation** is strictly confined to situations when "those who furnish or advance the purchase money to the purchaser in such a manner that they can be said either to have paid it to the vendor personally, or caused it to be paid on behalf of and for the benefit of the purchaser, and to this extent they become parties to the transaction. It must not be a general loan to be used by the purchaser to pay the consideration of the purchase, or to be used for any other purpose at his pleasure." [Deutsch, 127 Ohio St. at 510-511.](#)

[*P27] Here, ABN was not unjustly enriched. ABN paid off the first mortgage and expected to have first priority. CCDOD never expected to have first priority. This court has held that ^{HN7} a title company's negligence is not material in cases in which the competing lienholder "was not misled or injured, because it **[**12]** did not bargain for or expect a first lien position." [Cadle Co., supra.](#) Accordingly, CCDOD's first assignment of error is overruled.

It is ordered that appellees recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to [Rule 27 of the Rules of Appellate Procedure.](#)

SEAN C. GALLAGHER, PRESIDING JUDGE

MARY J. BOYLE, J., and

JAMES J. SWEENEY, J., CONCUR