COURT OF APPEALS
DECISION
DATED AND FILED

May 8, 2012

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2011AP919 **Cir. Ct. No. 2010CV114**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT III

CITIZENS STATE BANK,

PLAINTIFF-APPELLANT,

V.

TERRY E. PIRIUS, TERRY E. PIRIUS TRUST, PAIGE A. PIRIUS TRUST, PAIGE A. PIRIUS MARITAL TRUST, JULIE L. BARRETT, THE RIVERBANK, JOHN DOE, MARY ROE AND XYZ CORPORATION,

DEFENDANTS,

ASSOCIATED BANK, N.A.,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for St. Croix County: SCOTT R. NEEDHAM, Judge. *Affirmed*.

Before Hoover, P.J., Peterson and Mangerson, JJ.

¶1 PER CURIAM. Citizens State Bank appeals a summary judgment determining that Citizens' mortgage was inferior to a mortgage held by Associated Bank, N.A. Citizens argues the court erroneously applied equitable subrogation, for various reasons. We reject Citizens' arguments and affirm.

BACKGROUND

¶2 This case involves four separate mortgages secured entirely or partially by Terry Pirius's real property at 339 North Glover Road in Hudson. The mortgages were executed as follows:

> March 24, 2004—$345,000 mortgage to Associated (recorded Apr. 6) (Associated I)
>
> October 22, 2004—undescribed mortgage[1] to RiverBank (recorded Nov. 5)
>
> October 6, 2005—$280,000 mortgage to Citizens (recorded Oct. 11)
>
> June 23, 2006—$350,000 mortgage to Associated (recorded Jul. 17) (Associated II)

The funds from Associated's June 2006 mortgage (Associated II) were used primarily to satisfy Associated's March 2004 mortgage (Associated I). Following Pirius's defaults and the banks' respective foreclosures on the latter two mortgages, the circuit court was asked to determine the priority of the three outstanding mortgages. Applying equitable subrogation, the court determined that Associated II stepped into the position of Associated I. Thus, the order of lien priority was Associated II, RiverBank, and then Citizens. Citizens now appeals,

[1] Neither the parties nor the circuit court's decision identify the value of RiverBank's mortgage.

contending it should be in second position, with Associated third. Associated is the only respondent.

DISCUSSION

¶3 "Whether the law of equitable subrogation applies to the facts of this case is a question that we decide independently on review." ***Ocwen Loan Servicing, LLC v. Williams***, 2007 WI App 229, ¶6, 305 Wis. 2d 772, 741 N.W.2d 474. Thus, "we apply principles of equity to the facts before us." ***Id.*** (citation omitted). Additionally, because this case was resolved on summary judgment, we must reverse if there are material issues of fact in dispute. *See* WIS. STAT. § 802.08(2).[2]

¶4 "'Subrogation is an equitable doctrine invoked to avoid unjust enrichment, and may properly be applied whenever a person other than a mere volunteer pays a debt which in equity and good conscience should be satisfied by another.'" ***Ocwen***, 305 Wis. 2d 772, ¶7 (quoting ***Rock River Lumber Corp. v. Universal Mortg. Corp.***, 82 Wis. 2d 235, 240-41, 262 N.W.2d 114 (1978)). "Subrogation 'is applied or denied upon equitable principles. The object of subrogation is to do substantial justice independent of form or contract relation between the parties.'" ***Id.*** (quoting ***Rock River***, 82 Wis. 2d at 241-42). "To invoke subrogation, a lender must have either lent money to a debtor to pay a debt on which the lender was secondarily liable, … lent the money to protect the lender's own interest, or … entered into an agreement that the lender was to have security on the debt." ***Id.***

[2] All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

¶5 The parties agree that this case implicates only the third basis for subrogation—an agreement for security. In this circumstance:

> [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 [its] advances have discharged, provided that no innocent third parties will suffer. Equity will treat such a transaction as tantamount to an assignment of the original security.

Rock River, 82 Wis. 2d at 241 (citations omitted). Further, "subrogation will be available only where a definite agreement of the parties is shown and where a balancing of the equities favors application of the doctrine." ***Id.*** at 242. In cases involving priority of liens, the parties' agreement must include an intent that the subsequent loan will assume the priority position of the one for which it is substituting. *See* ***id.*** at 243-44; ***Ocwen***, 305 Wis. 2d 772, ¶¶15-17.

¶6 Citizens first argues that there is a dispute of material fact precluding a determination that Associated and Pirius entered into a definite agreement that Associated II would be in a first lien position. Citizens relies on the following form language in Associated II:

> 6. WARRANTY OF TITLE. Mortgagor warrants that Mortgagor is or will be lawfully seized of the estate conveyed by this Security Instrument and has the right to grant, bargain, convey, sell and mortgage the Property. Mortgagor also warrants that the Property is unencumbered, except for encumbrances of record.
>
> 7. PRIOR SECURITY INTERESTS. With regard to any other mortgage ... or other lien document that created a prior security interest or encumbrance on the Property, Mortgagor agrees:
>
> ….
>
> 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.

¶7 Citizens contends that provision 6 demonstrates there was no agreement to create a first priority mortgage because it "specifically indicates that the mortgage would be taken subject to any liens of record …." Citizens emphasizes that both its and RiverBank's mortgages were encumbrances of record when Associated II was executed and recorded.

¶8 Citizens is mistaken. Provision 6 does not state that Associated II is being taken "subject to" any liens of record. Rather, it is a representation by Pirius that there are no outstanding encumbrances on the property that are not recorded. The provision is neutral as to the parties' intent regarding priority. Indeed, the provision is entirely consistent with an intent that Associated II would be a first-priority mortgage. Associated I, which was being satisfied by the proceeds of Associated II, was also an "encumbrance of record," and already in first position.

¶9 Citizens argues that provision 7 further demonstrates a lack of intent to create a first-position mortgage because "language contemplating treatment of prior security interest[s] would not be necessary and should not be included." This argument, however, fails to acknowledge that provision 7 is form language. The provision does not indicate that there are, in fact, existing liens in a superior position; it merely addresses the possibility.

¶10 Ultimately, Citizens argues it was improper on summary judgment for the court to weigh the evidence purportedly in Citizens' favor—provisions 6 and 7—against parol evidence in Associated's favor—the Associated II loan application and underwriting documents.

¶11 In its decision, the circuit court observed:

> As collateral for Associated [m]ortgage II, the credit application signed by Pirius states Associated will have a

> "RL Lien: 1" which Associated uses to indicate a first real estate lien. Associated employee Peter Laux stated in his affidavit that retaining first position was a condition of agreeing to execute Associated [m]ortgage II.

Additionally, on the portion of the application where Pirius listed his existing credit obligations, he checked the box indicating that the new loan proceeds would be used to pay off an existing loan from Associated in the amount of $301,999, carrying a $1,974 monthly payment. This was the only outstanding debt to Associated noted on the application. The record also includes a check stub from Associated listing that account as the payee, in the amount of $303,604.64. In addition, Associated's underwriting worksheet contains several references to paying off mortgage I. Under "conditions," the worksheet indicated: "Close All Accounts Paid with proceeds of the Loan," "Verify Payoffs, Issue Joint Checks," and "Record Satisfaction(s)." Under "comments," which contains a series of internal bank communications, the worksheet stated a need to explain the $301,999 account with Associated. The reply states: "The associated bank one is the current [loan] he has with us that ... we will be paying off with the proceeds of this to get him a better rate and an increase for his personal investment uses." The final comment provides a loan payoff amount and indicates "satisfaction fee included."

¶12 We agree with Pirius that it would be improper to balance conflicting evidence of intent under summary judgment procedure. However, the evidence is not conflicting. There is no evidence suggesting that Pirius and Associated did not intend Associated II to satisfy Associated I and assume its position as the first-priority lien. All of the evidence from the loan application and underwriting documents indicates there was such intent. Therefore, we agree with the circuit court's conclusion that there is no dispute that Pirius and Associated

had a definite agreement that Associated II would substitute for Associated I and maintain priority.

¶13 Citizens next argues it was improper to rely on parol evidence to discern the intent of the written mortgage contract, particularly where the parol evidence conflicts with the written contract. We have already concluded that the parol evidence did not conflict with the mortgage language. This argument therefore fails.

¶14 Moreover, as observed in RiverBank's and Citizens' initial summary judgment briefs, we have previously looked to the mortgage application and underwriting documents to discern whether the lender and borrower had a definite agreement intending a new mortgage to substitute for, and assume the priority of, a prior mortgage for purposes of applying equitable subrogation. In the circuit court, before Associated responded, Citizens argued this case "is factually opposite to the situation in ***Ocwen***, wherein the parties were able to *clearly demonstrate* their intention to obtain a first mortgage[,] which was, in fact, a requirement to obtain funding." (Emphasis added.) This case is, however, factually *similar* to ***Ocwen***.[3] There, a definite agreement for a first-priority mortgage existed based solely on the following five parol facts: (1) the mortgagor applied for a refinancing loan; (2) the loan disbursement statement showed that the loan was used, at least in part, to pay off an existing mortgage on the property; (3) the underwriting sheet stated that the loan had to be a first mortgage; (4) the

[3] Citizens separately argues that there can be no "definite agreement" for a first-lien mortgage unless that intent is expressly set forth in the written mortgage contract. That argument similarly fails in light of ***Ocwen Loan Servicing, LLC v. Williams***, 2007 WI App 229, ¶17, 305 Wis. 2d 772, 741 N.W.2d 474.

mortgagee only advanced loans in exchange for second mortgages if it also held the first mortgage; and (5) the loan's closing instructions required verification that the mortgagee would have a first lien. ***Ocwen***, 305 Wis. 2d 772, ¶17.

¶15 In any event, Associated responds that, pursuant to ***Kafka v. Pope***, 186 Wis. 2d 472, 476-77, 521 N.W.2d 174 (Ct. App. 1994), *aff'd*, 194 Wis. 2d 234, 533 N.W.2d 491 (1995), the parol evidence rule is inapplicable when, as here, a court sits in equity. Citizens fails to reply to this argument and therefore concedes it. *See* ***Charolais Breeding Ranches, Ltd. v. FPC Secs. Corp.***, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979) (unrefuted arguments are deemed conceded).

¶16 Citizens next argues that Associated did not have a "justifiable expectation" that it would obtain a first mortgage. *See* ***Rock River***, 82 Wis. 2d at 241; *supra*, ¶5. It asserts that any such expectation was unjustified because Associated failed to conduct due diligence and review the title records. As the legal premise for this argument, Citizens cites ***Ocwen***, and reverts to a discussion of the mortgage language and whether there was a "definite agreement." Indeed, Citizens does not merely cite ***Ocwen***; it curiously recites its circuit court argument that we quoted above, baldly asserting that this case is factually dissimilar to ***Ocwen***. Addressing the equities in ***Ocwen***, however, we observed that the lender's negligence in failing to verify there were no other recorded liens was not determinative. ***Ocwen***, 305 Wis. 2d 772, ¶17. In fact, we acknowledged that issues of equitable subrogation rarely arise in the absence of negligence. ***Id.***, ¶21 (citing ***Iowa Cnty. Bank v. Pittz***, 192 Wis. 83, 91, 211 N.W. 134 (1926)); *see also* ***Home Owners' Loan Corp. v. Papara***, 241 Wis. 112, 120, 3 N.W.2d 730 (1942). Therefore, we conclude Citizens' argument is inadequately developed. *See* ***State***

v. Flynn, 190 Wis. 2d 31, 39 n.2, 527 N.W.2d 343 (Ct. App. 1994). To the extent Citizens develops a cognizable legal argument, it is contrary to ***Ocwen***.

¶17 Next, Citizens argues the equities do not favor granting equitable subrogation to Associated because doing so would unfairly prejudice Citizens' rights. Equitable subrogation is only appropriate where "no innocent third parties will suffer." ***Rock River***, 82 Wis. 2d at 241. Thus, "it is necessary to consider whether the rights of any third party have intervened in such a way as to render it inequitable to grant subrogation." ***Id.*** at 245. Here, the circuit court determined that "[a]pplying equitable subrogation puts Citizens and RiverBank in no worse position than they were when they executed their mortgages subsequent to the execution of the mortgage in first position at that time." With one minor caveat, we agree with that conclusion.[4]

¶18 However, Citizens argues its interests were negatively affected because it later relied on knowledge of the satisfaction of Associated I. Specifically, Citizens contends it "believed that the prior loan to [Associated] had been paid off by Pirius and, as a result, Citizens took no action during the previous five (5) years to pursue other avenues of payment from Pirius." Citizens' argument is as follows:

> Citizens … sought to confirm that [Associated I] had been paid off by obtaining that the [sic] 2006 Letter of Title, from River Valley Abstract & Title. … The 2006 Letter of Title confirmed the satisfaction of [Associated I], which

[4] Technically, Citizens is in a different position following subrogation because the proceeds of Associated II were not used exclusively to satisfy Associated I. As we explained in ***Ocwen***, however, this fact does not affect the equities. ***Ocwen***, 305 Wis. 2d 772, ¶20. Instead, subrogation may be limited in extent to that amount of the new loan that was used to satisfy the initial loan. *See* ***id.***, ¶23 n.11; ***Bank of Baraboo v. Prothero***, 215 Wis. 552, 555, 559, 255 N.W. 126 (1934). Citizens, however, raises no issue regarding the extent of subrogation.

> made Citizens confident in the security of the Citizens Mortgage. … In reliance on the security of the Citizens Mortgage, Citizens took no efforts to otherwise collect from Pirius who, at the time, had the ability to repay Citizens as Borrower's 2004 tax return shows adjusted gross income of [$936,026].
>
> … Had Associated not satisfied [Associated I], Citizens would have taken other collection action and would not be relying on the foreclosure of the Citizens Mortgage to collect the amounts due under the Citizens Note.

¶19 Citizens' argument has some initial appeal. However, it is not adequately developed to permit us to rely on the argument in balancing the equities.[5] *See* ***Flynn***, 190 Wis. 2d at 39 n.2. To start with, Citizens fails to identify the value of RiverBank's mortgage, which was also superior to Citizens' mortgage. Citizens also fails to explain what other collateral secured its note, or when exactly Pirius defaulted. Citizens further fails to specify what "collection actions" it would have taken or how those actions would have been authorized or might have proceeded. Indeed, Citizens refers to Pirius's 2004 tax return, but Citizens' mortgage to Pirius was not even executed until October 2005, and Associated I was not satisfied by Associated II until June 2006. In any event, we note that the circuit court's written decision does not address this argument, and Citizens does not mention this fact or assert that it raised the issue below. Thus, we deem the issue forfeited; it is the appellant's responsibility to demonstrate that issues were preserved in the circuit court. ***State v. Caban***, 210 Wis. 2d 597, 604, 563 N.W.2d 501 (1997).

[5] Associated, for its part, takes a significant gamble and fails to reply to Citizens' argument. Ordinarily, unrefuted arguments are deemed conceded. *See* ***Charolais Breeding Ranches, Ltd. v. FPC Secs. Corp.***, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979).

¶20 Finally, Citizens argues that, regardless of priority of the mortgages, the circuit court erred by denying that part of Citizens' summary judgment motion seeking judgment against Pirius for the amount due on Citizens' mortgage. Citizens, however, failed to identify Pirius as a respondent in this appeal. Thus, Pirius is not a party to the appeal and has filed no brief. We therefore disregard Citizens' argument.

By the Court.—Judgment affirmed.

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