

COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
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Court of Appeals No. 39596-7-II

LaSALLE BANK NATIONAL ASSOCIATION,

Appellant

Vs.

PATRICIA L. VOGTMAN, ET AL,

Respondents.

APPEAL FROM THE SUPERIOR COURT
FOR PIERCE COUNTY
HONORABLE FREDERICK FLEMING

REPLY BRIEF OF APPELLANT

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I. The Loss Suffered by Ms Ghramm Was Due to the Misfeasance of Mrs. Vogtman, Not to the Error Made by Third Parties in Preparing the 2005 Loan Documents for Mrs. Vogtman's Signature.

A theme that runs through the Respondent's Brief is that Ms Ghramm has suffered loss due to the error made in the preparation of the 2005 loan documents for Mrs. Vogtman's signature. The last sentence in the Introduction to Respondent's Brief at page 3 reads as follows: "Someone made a mistake, but Ghramm should not suffer for it." The last sentence in Part A of the Argument in Respondent's Brief at page 12 reads as follows: "It would be grossly unfair for Ghramm to bear the burden of a mistake she had no part in making." The last sentence in the next to last paragraph of Part B of the Argument in Respondent's Brief at page 17 reads as follows: "She should not suffer from their mistake."

Ms Ghramm will suffer loss if the summary judgment entered by the trial court is set aside and LaSalle Bank is allowed to foreclose the 2005 deed of trust non-judicially. There is no question about that. But that loss is attributable to the misfeasance of Mrs. Vogtman. That loss is not attributable to LaSalle Bank. Nor is that loss attributable to the error made by third parties in preparing the 2005 loan documents.

Mrs. Vogtman wronged Ms Ghramm in neglecting the estate, in

not providing Ms Ghramm with an accounting, and in allowing the 2005 loan to go into default. LaSalle Bank, which now owns the 2005 loan as trustee for a syndicate of innocent investors, did not wrong Ms Ghramm. The third parties who erred in not identifying Mrs. Vogtman as the personal representative of a decedent's estate in preparing the 2005 loan documents did not wrong Ms Ghramm. If no mistake had been made in preparing the 2005 loan documents – if the 2005 loan documents had been properly drafted – Mrs. Vogtman would have signed them in her representative capacity. The loan that was made would have been made. Mrs. Vogtman had non-intervention powers. Ms Ghramm had not filed a request for special notice of proceedings under RCW 11.28.240. Ms Ghramm's cooperation was not required. If the 2005 loan documents had been properly prepared by third parties and signed by Mrs. Vogtman in her representative capacity the loss suffered by Ms Ghramm would be identical to the loss Ms Ghramm will suffer if the summary judgment entered by the trial court is set aside.

II. Mrs. Vogtman Was Authorized to Encumber the Subject Property. LaSalle Bank is Entitled to a Conclusive Presumption that the 2005 Loan Was Necessary for the Administration of the Vernon Vogtman Estate.

A second theme that runs through the Respondent's Brief is that

Mrs. Vogtman was not authorized to encumber the subject property or that the 2005 note and deed of trust are unenforceable because Mrs. Vogtman used the cash proceeds of the 2005 loan for her own purposes. In the Introduction to the Respondent's Brief at page 2 the following statement is made: "The LaSalle loan (the 2005 note/deed of trust now owned by LaSalle Bank) could only encumber Vogtman's one half interest in the property." At page 7 of the Respondent's Brief Ms Ghramm argues: "It is undisputed that Vogtman did not sign in her capacity as personal representative, nor would she have been authorized under her fiduciary duty to the estate and its heirs to do so . . . Plaintiff/Appellant (LaSalle Bank) failed to meet its burden of proof that Vogtman was refinancing this property as the personal representative and for the benefit of the estate . . . Therefore, the LaSalle loan encumbers only a one half interest in the property." (emphasis added)

There is no merit to the argument that in 2005 Mrs. Vogtman could only encumber an undivided 50% interest in the subject property. The subject property was community property. In 2005, the whole of the subject property was being administered by Mrs. Vogtman, the duly appointed personal representative of the Vernon Vogtman Estate. Mrs.

Vogtman had been granted non-intervention powers. C.P. 104-105.

Under RCW 11.68.090, Mrs. Vogtman could encumber the entire property being administered. That is what she did. The 2005 deed of trust legally describes the entire property. C.P. 74-77. If the 2005 deed of trust had said that only an undivided 50% interest in the property is being encumbered, there would be merit to the Respondent's argument. But the 2005 deed of trust does not say that. Nor is there merit to the suggestion in the Respondent's Brief that LaSalle Bank has to show that Mrs. Vogtman refinanced the property in 2005 "for the benefit of the estate." LaSalle Bank has no such burden of proof. Under RCW 11.68.090 LaSalle Bank, as the successor to Liberty American Mortgage Corporation, is entitled to have it conclusively presumed that the 2005 refinancing was necessary for the administration of the decedent's estate.

III. LaSalle Bank Is Entitled to Equitable Relief on the Facts of This Case.

Respondent Ghramm argues at pages thirteen through seventeen of her brief that equitable subrogation does not apply where, as here, the dispute is between the holder of an encumbrance and someone who claims an ownership interest in the property. There is no merit to that argument.

A LaSalle Bank is Entitled to Equitable Relief Under the Principles of Equitable Subrogation Adopted by the

**Washington Supreme Court in Wilson v. Hubbard, 39 Wa
671, 82 Pac. 154 (1905)**

In its simplest form, the doctrine of equitable subrogation protects a mortgagee who in good faith loans money to someone who has color of title to real property and the money is used to pay debts secured by an interest in the property. The mortgagee is said to be subrogated to the rights of the creditors who were discharged. Equitable subrogation in that simple form has been recognized in Washington since at least 1905. In that year the Washington Supreme Court decided Wilson v. Hubbard, 39 Wash 671, 82 Pac 154 (1905). The Wilson case involved a mortgagee (Hubbard) who had loaned money to Wilson, the guardian of a minor's estate. The loan was secured by guardianship property. Proceeds of the loan were used to pay prior debts that were secured by the guardianship property. At issue was whether Hubbard was entitled to foreclose the mortgage. In addressing that issue, the Washington Supreme Court recognized that even if the mortgage itself was void, under the doctrine of subrogation Hubbard was entitled to have the former mortgage reinstated and foreclosed for his benefit. The court said (pp 687-688):

“The facts exist, however, that a purported mortgage was executed by said Charles D. Wilson, guardian, in pursuance of said pretended order of court; that respondent Hubbard in good

faith loaned his money on the faith thereof; that the money so loaned was used to pay a valid lien on said real estate which was prior and paramount to any interests of appellants, and that thereby a threatened, immediate, and final loss of their property was obviated. Conceding the order to mortgage and the mortgage itself to have been void, nevertheless respondent Hubbard, under the doctrine of subrogation, was equitably entitled to have the former mortgage reinstated and foreclosed for his benefit. *Crippen v. Chappel, supra*. This in effect was the substantial result of the final decree in said cause 10,072, and in doing justice here, it becomes an immaterial consideration as to whether said guardian's mortgage was void. Appellants have not offered or shown any willingness to pay the amount now due on the prior mortgage executed by their mother, neither have they offered to redeem from respondent's mortgage. We fail to see that they have shown any defense to respondent's claims. The superior court certainly had jurisdiction in cause No. 10,072 of the subject matter and the parties, and appears to have done equity. We fail to find any prejudicial error in said foreclosure decree, and the trial court committed no error in refusing to vacate the same.

The judgment is affirmed.”

See also Bormann v. Hatfield, 96 Wash 270, 164 Pac. 921 (1917);

American Sav. Bank and Trust Co. v. Helgesen, 67 Wash 572, 122 Pac. 26 (1912).

B. Cases From Other Jurisdictions Support Petitioner's Equitable Subrogation Claim.

Equitable subrogation cases from other jurisdictions are collected and discussed in Annotation, Discharge of Mortgage and Taking Back of New Mortgage As Affecting Lien Intervening Between Old and New

Mortgages, 43 ALR 5th 519 (1996). The cases discussed in the Annotation are generally in accord with Wilson v. Hubbard, supra. Katsivalis v. Serrano Reconveyance Co., 70 Cal App 3d 200, 138 Cal Rptr 620 (1977) is a representative case. In the Katsivalis case, a widow sought to cancel a note and deed of trust executed by her deceased husband for himself and for her as her attorney in fact in order to refinance certain debt. Under California law the widow's right of homestead could not be waived by an attorney in fact, so the deed of trust was voidable. Nevertheless, because the proceeds of the loan were used to discharge liens against the property that antedated the homestead the lender that refinanced the home was entitled to equitable relief. The California court said (138 Cal Rptr at 625):

“The lender is entitled to relief in this case on general principles stated in *Simon Newman Co. v. Fink* (1928) 206 Cal. 143, 273 P. 565, quoting from 27 American & English Encyclopedia of Law, second edition, at page 247, as follows: “One who advances money to pay off an encumbrance on realty at the instance of either the owner of the property or the holder of the encumbrance, either on the express understanding, or under circumstances from which an understanding will be implied, that the advance made is to be secured by a first lien on the property, is not a mere volunteer; and in the event the new security is for any reason not a first lien on the property, the holder of such security, if not chargeable with culpable and inexcusable neglect, will be subrogated to the rights of the prior encumbrancer under the security held by him, unless the superior or equal equities of

others would be prejudiced thereby, and to this end equity will set aside a cancellation of such security, and revive the same for his benefit.”

LaSalle Bank is entitled to equitable relief on the facts of this case.

IV. Reply To Respondent’s “The Title Insurance Company Should Take the Hit” Argument.

At the hearing in the trial court on the summary judgment motions, counsel for the Respondent made the following argument:

“MS. CARVER: And in fact, Your Honor, I think really the mistake was made by Lawyers Title. They’re the one that have the duty to search for an heir on a published will. I mean, this probate – the will is of record. That’s their job. And that’s the insurance’s responsibility to take the hit.”

Verbatim Report of Proceedings, page 7, lines 2-6.

On page 12 of Respondent’s Brief, counsel reiterates that argument. She says:

“The point is that someone made the mistake of not requiring the proper signature of the and/or some written guarantee from the heir. More importantly, the Plaintiffs have a remedy – Title Insurance.”

The Respondent’s “the title insurance company should take the hit” argument was also made in the Katsivalis case, supra. In rejecting it, the California court said (138 Cal Rptr at 627):

“In the refinancing of the loan the sum of \$167.80 was charged to the borrower for "cost of recording deed and other documents, reconveyance charge and *title insurance fee*.”

(Emphasis added.) The widow asserts that the court committed error in awarding an equitable lien since the lender had an adequate remedy at law. (See *Morrison v. Land* (1915) 169 Cal. 580, 586, 147 P. 259.) As we have seen, equity generally will act to give a lender the security for which he bargained in the situation when there is mistake or fraud with respect to an intervening right which cuts off a preexisting encumbrance which has been satisfied by the loan proceeds. The fact the creditor has' an unsecured right to recover against the debtor is not an adequate legal remedy .. The widow, however, claims that the lender's right to indemnification from the title company gives it adequate relief in this case. That argument must fail on two grounds. In the first place the existence of a legal remedy against one of several obligors cannot relieve another obligor of his equitable responsibility. (See, *Barr v. Roderick* (D.C.N.D.Cal.1925)11 F.2d 984, 986.) In the second place the title company, if called upon to indemnify the lender is entitled to be subrogated to all of its rights against the borrower. The advantage of spreading losses arising from particular contingencies over many premium payers through the insurance device is well recognized in modern jurisprudence. We know of no policy, however, that necessitates burdening those premium payers with the costs of enriching a widow, destitute though she may be, who seeks to increase her equity in a homestead because of the mutual mistake of her husband and the lender and the latter's title insurer. In this case, as in *Viotti v. Giomi, supra*, there was an error by a title company in overlooking a valid homestead (see 230 Cal.App.2d at p. 734, 41 Cal.Rptr. 345). Nevertheless in that case, unlike this case, the creditor had not advanced funds to discharge valid encumbrances against the homestead. He was a levying creditor without a right to subrogation.”

The analysis by the California court in the Katsivalis case is equally applicable to this case. See also the discussion of title insurance and the doctrine of equitable subrogation in Bank of America v. Prestance Corp.,

160 Wn 2d 560, 580-81, 160 P 3d 17 (2007). There is no merit to the Respondent's "the title insurance company should take the hit" argument.

V. Conclusion.

In 2003, when Vernon Vogtman died, the whole of the subject property was encumbered by a deed of trust that secured payment of a \$116,000 note payable to Crossland Mortgage company. C.P. 64-65. That indebtedness was paid in 2004 from the proceeds of a new note and deed of trust that purported to encumber the whole of the subject property. C.P. 67-72. The 2004 loan was, in turn, paid from the proceeds of the 2005 loan, which again was secured by a deed of trust that purports to encumber the whole of the subject property. C.P. 74-77. Ms Ghramm now claims at page 17 of the Respondent's Brief that by reason of the error made by third parties in 2005 in preparing loan documents "any new owner of the property will take it as a tenant in common with Ghramm's one-half interest, which is free and clear of the mortgage being foreclosed." There is no merit to that claim.

LaSalle Bank respectfully submits that this Court should reverse the trial court and remand the case for entry of a decree declaring that that any interest that Lisa L. Ghramm might have under the 2008 deed is

inferior and subordinate to the plaintiff's 2005 deed of trust and the plaintiff is entitled to foreclose that deed of trust non-judicially against the interests of Mrs. Vogtman, Ms Ghramm and the Estate of Vernon Vogtman.

In the alternative, this Court should declare that the interests of the Estate of Vernon Vogtman and the defendant Lisa L. Ghramm in the home at 310 125th Street South, Tacoma, Washington, are inferior and subordinate to a \$112,300 equitable lien in favor of LaSalle Bank under the general rules of equitable subrogation and remand the case to the trial court so that that lien can be foreclosed judicially.

DATED this 20 day of November, 2009.



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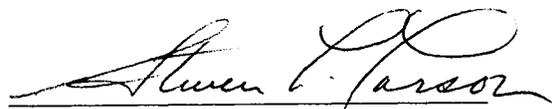
Case No. 39596-7-II

PROOF OF SERVICE OF
APPELLANT'S REPLY BRIEF

I certify that on November 20, 2009, I placed a copy of the
APPELLANT'S REPLY BRIEF in the above-captioned matter in an envelope,
mailed regular mail, in the U.S. Postal Service mailbox that is picked up at
Proctor Station, Tacoma, Washington, directed to the following:

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