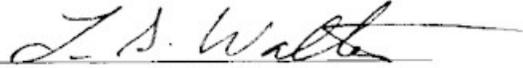


This document has been electronically entered in the records of the United States Bankruptcy Court for the Southern District of Ohio.

IT IS SO ORDERED.

Dated: January 22, 2008


Lawrence S. Walter
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION AT DAYTON

In re: CYNTHIA JANE ADAMS,

Debtor

Case No. 06-30369

Adv. No. 06-3471

CYNTHIA JANE ADAMS,

Plaintiff

Judge L. S. Walter

Chapter 13

v.

ABN AMRO MORTGAGE GROUP, INC.,

Defendant

DECISION OF THE COURT GRANTING SUMMARY JUDGMENT TO
THIRD PARTY DEFENDANT JP MORGAN CHASE BANK AND DENYING
SUMMARY JUDGMENT TO ABN AMRO MORTGAGE GROUP, INC.

The court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157(a) and 1334, and the standing General Order of Reference in this District. This matter is before the court on the motion for summary judgment filed by third party defendant, JP Morgan Chase Bank (“Chase”) as successor-in-interest to Bank One [Adv. Doc. 21]; the responsive memorandum and cross motion for summary judgment filed in opposition by defendant ABN Amro Mortgage Group, Inc. (“Amro”) [Adv. Doc. 30]; and the reply / responsive memorandum of Chase [Adv. Doc. 31]. The court further considers the joint stipulations of the parties filed November 6, 2007 [Adv. Doc. 34].

FACTUAL AND PROCEDURAL BACKGROUND

On November 8, 2006, the Plaintiff-Debtor Cynthia Adams (“Debtor”) filed an adversary proceeding to avoid Amro’s mortgage lien. In her complaint, the Debtor asserts that Amro has the junior lien against the Debtor’s residential property and that there is no equity to which its lien may attach. The Debtor further acknowledges Chase as the senior mortgage holder. The Debtor proposes to strip Amro’s lien and treat Amro as an unsecured creditor in accordance with the Debtor’s confirmed Chapter 13 plan. On November 22, 2006, Amro filed an answer, counterclaim, and third party complaint naming Chase as a third party defendant. In this pleading, Amro asserts that it is entitled to equitable subrogation pursuant to Ohio law. Amro explains that the proceeds from its loan were used to refinance and pay off Chase’s open-end loan and, consequently, Amro should be equitably subrogated to Chase’s first priority lien position. Chase proceeded to answer the third party complaint and filed a motion for summary judgment disputing whether Amro is entitled to equitable subrogation.

The parties have filed joint stipulations agreeing to the following facts:

1. Chase is the successor to Bank One.
2. The Debtor along with her deceased husband obtained a home equity line of credit from Chase in the amount of \$101,306.34 which was secured by an open-end mortgage signed March 17, 1999 and is attached to Chase's motion for summary judgment as exhibit A. [Adv. Doc. 21, Ex. A.]
3. Amro's mortgage was signed on July 26, 2000 by the Debtor and her late husband and the mortgage is attached to Chase's motion for summary judgment as Exhibit B. [Adv. Doc. 21, Ex. B.]
4. Amro is the successor to McKinley Mortgage.
5. Chase's mortgage was filed on March 31, 1999.
6. Amro's mortgage was filed on August 30, 2000.
7. Both mortgages are secured in real estate owned by the Debtor and known as 1525 Horlacher Avenue, Kettering, Ohio ("Collateral").
8. Chase provided the Debtor with a payoff statement on or about June 30, 2000 attached as Exhibit 1 to Amro's answer. [Adv. Doc. 5, Ex. 1.] This payoff statement acknowledges the amount needed to pay off the loan and also notes that to close the account, "Borrower's written request to close is required." [*Id.*]
9. Chase was paid \$101,796.81 on or about August 2, 2000 by the Debtor. Chase credited the Debtor's open-end home equity loan with the payment on that same day.
10. A termination letter regarding the home equity line of credit signed by the borrower was not sent with the payoff check.

11. The closing of the refinance occurred on July 26, 2000 and the closing papers are attached as Exhibit 3 to Amro's answer. [Adv. Doc. 5, Ex. 3.]

12. A transaction history maintained in the regular course of business by Chase for its loan shows the following:

Date	Amount	Fees	Prin	Int	Balance	Description
6/29/2000	50.00	0	0	0	98,981.00	6121 Add Misc. Fee
6/29/2000	0	0	0	0	98,981.00	5800 extension
6/30/2000	809.36	0	0	0	98,981.00	4170 Int Accr
6/30/2000	38.45	0	0	0	99,019.45	5557 Add Ins Ctd
6/30/2000	59.00	0	0	0	99,078.45	5557 Add Ins Ctd
6/30/2000	27.93	0	0	0	99,078.45	4170 Int Accr
...						
8/02/2000	29.12	0	0	0	99,175.90	4170 Int Accr
8/02/2000	99,107.53	0	0	0	68.37	6400 Reg Pmt
8/02/2000	2,604.51	0	0	0	68.37	6442 Reg Pmt
8/02/2000	25.00	0	0	0	68.37	6090 Late Fee
8/02/2000	9.77	0	0	0	68.37	6096 Ann Fee Pmt
8/02/2000	50.00	0	0	0	68.37	6091 Misc Fee Pd

13. Chase did not receive any written notice by Amro regarding its lien on the Collateral.

14. Debtor took an advance against the Chase line of credit in the amount of \$17,500 on or about October 30, 2000.

15. The balance on the Chase loan at the time of the bankruptcy filing was \$81,923.42.

16. The collateral had an appraised value of \$70,000 at the time of the Debtor's bankruptcy.

SUMMARY JUDGMENT STANDARD

The appropriate standard to address the cross motions for summary judgment filed in this adversary proceeding is contained in Fed. R. Civ. P. 56(c) and incorporated in bankruptcy adversary proceedings by reference in Fed. R. Bankr. P. 7056. Rule 56(c) states in part that a court must grant summary judgment to the moving party if:

the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show 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.

Fed. R. Civ. P. 56(c). In order to prevail, the moving party, if bearing the burden of persuasion at trial, must establish all elements of its claim. *Celotex Corp. v. Catrett*, 477 U.S. 317, 331 (1986). If the burden is on the nonmoving party at trial, the movant must: 1) submit affirmative evidence that negates an essential element of the nonmoving party's claim; or 2) demonstrate to the court that the nonmoving party's evidence is insufficient to establish an essential element of the nonmoving party's claim. *Id.* at 331-32.

Thereafter, the opposing party "must come forward with 'specific facts showing that there is a genuine issue for trial.'" *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986) (citations omitted); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249-251 (1986). All inferences drawn from the underlying facts must be viewed in a light most favorable to the party opposing the motion. *Matsushita*, 475 U.S. at 586-88.

LEGAL ANALYSIS

At issue on summary judgment is whether a second mortgage holder whose loan proceeds were used by the borrowing Debtor to pay off the senior lien securing an open-end loan may use equitable subrogation to obtain first priority of its lien rights when the open-end loan account was never terminated and the Debtor continued to use the line of credit after the payoff. As discussed below, the court concludes that equitable subrogation is not available to Amro as the junior lienholder because its second place priority position is a result of its, or its predecessor's, own negligent business practices.¹ Consequently, the court grants summary judgment to Chase and denies summary judgment to Amro.

Amro finds itself in the position of a junior lienholder pursuant to several principles of Ohio law.² First, the priority of mortgage liens against real property is generally determined by the order of the recording of the mortgages. *See* Ohio Rev. Code § 5301.23(A). In this case, both parties agree that Chase's mortgage lien was filed prior to Amro's lien. Second, Chase's loan to the Debtor was an "open-end" mortgage loan or line of credit governed by the provisions of Ohio Rev. Code § 5301.232. Pursuant to this statutory provision, Chase's mortgage remained first in priority as determined by the date of recording even though the Debtor took advances against Chase's line of credit after the date that Amro's mortgage was recorded. Ohio Rev. Code § 5301.232(B).

Pursuant to Ohio law, Amro could have obtained first priority over Chase's open-end mortgage using at least two alternative methods. First, Amro could have required the

¹ Both Amro and Chase have predecessors-in-interest and, consequently, many of the actions or inactions of the parties may be attributable to these prior entities.

² The priority of these liens against real property in Ohio is determined by Ohio law.

termination or cancellation of Chase's open-end mortgage loan account pursuant to the provisions of Ohio Rev. Code § 1321.58. This section provides that an open-end account with a zero balance may be terminated by written notice from either the borrower to the mortgage holder or visa-versa. Ohio Rev. Code § 1321.58(F). The parties have stipulated to the fact that no such written notice terminating the account was given by the borrowing Debtor after the payoff nor is there any evidence on summary judgment that Chase or its predecessor drafted such a written notice.

Second, Ohio Rev. Code § 5301.232(B) allows for a subsequent junior lien, like that of Amro, to gain priority over new advances on a line of credit if: 1) the open-end mortgagee [Chase] receives written notice of the new lien prior to new advances being made and 2) the open-end mortgagee is not required to make new advances pursuant to its agreement with the borrower at the time the notice was received. For the written notice of the new lien to be valid, it must comply with Ohio Rev. Code § 5301.232(D) which requires that the written notice: 1) be signed by the subsequent lien holder or its agent or attorney; 2) set forth a description of the real property, the dates, parties to the mortgage, the volume and initial page of the record or the recorder's file number of the mortgage over which the priority is claimed; and 3) the amount and nature of the claim to which the lien relates. On summary judgment, the parties have stipulated to the fact that Amro never provided Chase with a written notice of its new lien complying with the requirements of Ohio Rev. Code § 5301.232(D).³

³ It is true that as part of the refinancing process, Chase's predecessor drafted a payoff statement for the open-end loan directed to the borrowers. Amro seems to argue on summary judgment that this payoff statement demonstrates that Chase's predecessor had written notice of the refinancing arrangement and new lien that was used by the borrowers to pay off Chase's loan. However, the payoff statement does not mention Amro's lien, the statement is not signed by Amro or its predecessor, and it does not contain a description of the real property. Consequently, this payoff statement in no manner complies with the

Nonetheless, Amro argues it is entitled to be equitably subrogated to Chase's first priority position because Amro's loan proceeds were used to refinance and pay off Chase's open-end mortgage loan.

It is true that the doctrine of equitable subrogation has been used in some circumstances to defeat the statutory rule of first in time, first in right. *Washington Mutual Bank v. Loveland*, 2005 WL 737403, at *2 (Ohio Ct. App. March 31, 2005). The doctrine “. . . arises by operation of law when one having a liability or right to a fiduciary relation in the premises pays a debt due by another under such circumstances that he is in equity entitled to the security or obligation held by the creditor whom he has paid.” *Ohio v. Jones*, 61 Ohio St.2d 99, 102, 399 N.E.2d 1215, 1217 (1980) (further citations omitted). Its purpose is largely to prevent fraud and provide relief against mistakes. 61 Ohio St.2d at 102, 399 N.E.2d at 1217-18. The right to equitable subrogation depends upon the facts and circumstances of each case, and, in order to be entitled to subrogation, a party's “equity must be strong and his case clear.” *Id.*

While equitable subrogation may be used to correct errors and prevent unjust enrichment, it is not intended to relieve a party of a second priority position with respect to a lien when the party is in the position due to its own negligence or “improvident business maneuvers.” 61 Ohio St.2d at 103; 399 N.E.2d at 1218. For example, in *Jones*, a mortgagee in control of the recording process failed to protect its interest by promptly recording a signed mortgage. The state properly filed a judgment lien against the property in the interval between the signing and recording of the mortgage. In this situation, the Supreme Court of Ohio refused to apply equitable subrogation to give the

“written notice” requirements of Ohio Rev. Code § 5301.232(D) as needed for Amro's junior lien to gain priority over subsequent advances.

mortgagee first priority lien rights because the court concluded that the mortgagee's "own actions led to its dilemma of not obtaining the best priority lien." 61 Ohio St.2d at 102; 399 N.E.2d at 1218.

In two cases factually similar to the one at hand, Ohio appellate courts have refused to invoke equitable subrogation when the refinancing mortgagee that pays off a home equity line of credit fails to ensure that the open-end loan is canceled or terminated following the payoff. In *Bank of New York*, the borrowers desired to refinance an open-end mortgage loan and engaged a refinancing mortgagee. *Bank of New York v. Fifth Third Bank of Central Ohio*, 2002 WL 121925, at *1 (Ohio Ct. App. Jan. 30, 2002). As part of the process, the refinancing mortgagee contacted the bank whose open-end loan was to be paid requesting a payoff statement. *Id.* The bank obliged and provided a payoff statement noting the amount needed to pay off the loan and further explaining that to terminate the account, a written request from the borrower must be received by the bank with the full payment. *Id.* No such written request was received by the bank and, consequently, the open-end mortgage loan with the bank was not terminated and the borrowers were able to continue borrowing against the line of credit following the payoff. *Id.* After the borrowers defaulted on their loans and a foreclosure action was initiated, the refinancing mortgagee argued that it was entitled to be equitably subrogated to the first priority rights of the bank with the open-end mortgage. *Id.* The court disagreed noting that the refinancing mortgagee could have secured a first priority position by insisting that it receive a copy of the terminated equity line agreement from the bank or borrowers, but failed to do so. *Id.* at *4. In refusing to apply the doctrine of equitable subrogation, the appellate court, quoting the lower court, stated that "[w]hen the secured

party does not protect its own interest by ensuring that the first loan is canceled before extending credit, this Court will not invoke equity to compensate for the shortcomings easily avoided.” *Id.*

A similar result was reached in the case of *Washington Mutual Bank v. Loveland*, 2005 WL 737403 (Ohio Ct. App. March 31, 2005). In *Washington Mutual Bank*, the court concluded that the junior mortgagee’s failure to follow proper procedures to confirm that the senior mortgagee’s home equity line was closed and the lien properly released upon payoff made it negligent in its business transactions and not entitled to application of equitable subrogation. 2005 WL 737403, at *3-4. Although equitable subrogation was applied in a different case involving a refinancing mortgagee’s failure to ensure the closing of a prior open-end account, the decision clarifies that the junior mortgagee had a basis for believing that the account had actually been closed. *See Bank One Columbus, NA v. Jude*, 2003 WL 21469145, at *5 (Ohio Ct. App. June 26, 2003) (confusing correspondence from the bank holding the open-end mortgage indicated that the open-end account had been closed and necessary documentation had been sent to remove the lien).

In this case, Amro, or its predecessor, could have secured a first priority position by ensuring that Chase’s open-end loan was canceled as part of the refinancing and payoff pursuant to Ohio law allowing such a termination to occur by written notice of the borrower or mortgage holder. Indeed, the payoff statement from Chase’s predecessor explains the need to obtain such written notice from the borrowers in order to close the account. [Adv. Doc. 5, Ex. 1.] Amro has provided no evidence that it or its predecessor took any actions to ensure that the proper written notice was provided so as to close

Chase's open-end account and ensure that Amro would gain a first priority position. Moreover, Amro has produced no documentation or correspondence from Chase that Amro could rely on indicating that the account had been closed. The court concludes that Amro is in a junior lien position because of the negligent business practices of it or its predecessor. In such circumstances, the court will not apply equitable subrogation to benefit the second priority lien holder.⁴ Therefore, the court grants summary judgment to the third party defendant in this case.

CONCLUSION

For the foregoing reasons, the court grants summary judgment to JP Morgan Chase Bank and denies summary judgment to ABN Amro Mortgage Group, Inc.

SO ORDERED.

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⁴ In its summary judgment memorandum, Amro asserts that the Debtor may be in violation of her agreement with Amro by failing to ensure that Amro's lien would receive first priority. [Adv. Doc. 30, pp. 6-7.] However, the Debtor was not made a party to Chase and Amro's cross motions for summary judgment and, consequently, has not had an opportunity to address this legal argument. As such, the court will not consider Amro's claims or defenses against the Debtor on summary judgment.

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