

IN THE NEBRASKA COURT OF APPEALS

MEMORANDUM OPINION AND JUDGMENT ON APPEAL

WURDEMAN V. WELLS FARGO BANK

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KENNETH P. WURDEMAN AND CHONG S. WURDEMAN, APPELLANTS,
V.
WELLS FARGO BANK, N.A., APPELLEE.

Filed December 20, 2011. No. A-11-322.

Appeal from the District Court for Lancaster County: KAREN B. FLOWERS, Judge.
Affirmed.

Frederick D. Stehlik, Jessica S. Wolff, and Francie C. Riedmann, of Gross & Welch,
P.C., L.L.O., for appellants.

William G. Blake and Derek C. Zimmerman, of Baylor, Evnen, Curtiss, Gritmit & Witt,
L.L.P., for appellee.

IRWIN, MOORE, and CASSEL, Judges.

IRWIN, Judge.

I. INTRODUCTION

Kenneth P. Wurdeman and Chong S. Wurdeman appeal an order of the district court for Lancaster County, Nebraska, declaring that Wells Fargo Bank, N.A. (Wells Fargo), is entitled to be subrogated to a first lien position and that the Wurdemans hold a lien junior and inferior to Wells Fargo's subrogated first lien position. The only issue raised by the Wurdemans on appeal is an assertion that the district court erred in applying the doctrine of conventional subrogation to award Wells Fargo the superior lien interest. We find no merit to the appeal, and we affirm.

II. BACKGROUND

This case concerns the priority of separate liens held by the Wurdemans and Wells Fargo on property owned by Kristy and Corey Osborn. The action in the district court was commenced by the Wurdemans seeking a declaration that their lien should have priority over Wells Fargo's

lien because it was filed prior in time to Wells Fargo's lien. Wells Fargo counterclaimed and asserted a right to application of the doctrine of conventional subrogation and sought a declaration that its lien should have priority over the Wurdemans' lien. In a well-reasoned and articulate opinion, the district court agreed with Wells Fargo.

In 2004, the Wurdemans sold real property to the Osborns for approximately \$286,750. The purchase agreement between the Osborns and the Wurdemans provided that the Osborns would borrow \$125,000 from a bank and that the remaining \$161,750 would be carried back by the Wurdemans. The Osborns obtained a loan for \$125,000 from TierOne Bank (TierOne), which took a first lien on the property. The Wurdemans then obtained a second lien on the property.

In 2006 or 2007, the Osborns desired to refinance. The Osborns obtained a new loan with Security First Bank (Security First) in the amount of \$175,000. The outstanding balance owed on the TierOne note, \$120,010.43, was paid off. Wells Fargo eventually purchased the Security First note and became the assignee of the deed of trust between the Osborns and Security First.

There was a dispute at trial concerning the Wurdemans' knowledge and agreement to events surrounding the refinancing and the Security First loan. The trial court found that the Osborns contacted the Wurdemans about the refinancing and about getting the Wurdemans' assistance in allowing Security First to have priority over the Wurdemans with respect to the new loan and its accompanying lien. The trial court found that the Wurdemans executed a deed of reconveyance, with the intent that the Osborns would secure the Security First loan, pay off the TierOne loan, and file the Security First lien as a first lien, and would then execute a new deed of trust to the Wurdemans and give the Wurdemans a second lien. Although there was a dispute at trial, there was evidence to support these findings.

The difficulty and issues in this case arose because, after Security First made its loan to the Osborns, the Wurdemans filed their lien prior to Security First's filing its lien. Security First asked the Wurdemans to subrogate their interest to Security First's interest, but the Wurdemans refused.

The Osborns subsequently defaulted on the notes held by Wells Fargo and the Wurdemans, and declared bankruptcy. The Wurdemans then commenced this action, seeking a declaration that their lien interest was first in priority because it was filed first. Wells Fargo answered and asserted a counterclaim for a declaration that it was entitled to be subrogated to the rights and the first lien originally held by TierOne, superior to the Wurdemans' lien, under the doctrine of conventional subrogation.

The district court found in favor of Wells Fargo, applied the doctrine of conventional subrogation, and found that Wells Fargo held a first lien in an amount equal to the amount that was used to pay off the prior TierOne loan, \$120,010.43, and that the Wurdemans held a lien junior to Wells Fargo's. This appeal followed.

III. ASSIGNMENT OF ERROR

The Wurdemans' sole assignment of error is that the district court erred in determining that Wells Fargo is subrogated to the first lien position and that the Wurdemans hold a lien junior to Wells Fargo's lien.

IV. ANALYSIS

On appeal, the Wurdemans assert that the district court erred in applying the doctrine of conventional subrogation and in finding that Wells Fargo's lien was superior to the Wurdemans' lien, despite the Wurdemans' lien being recorded first in time. We find no merit to the Wurdemans' assertions.

An action for declaratory judgment is *sui generis*; whether such action is to be treated as one at law or as one in equity is to be determined by the nature of the dispute. *Smith v. City of Papillion*, 270 Neb. 607, 705 N.W.2d 584 (2005). The essential character of a cause of action and the remedy or relief it seeks as shown by the allegations of the pleadings determine whether a particular action is one at law or in equity. See *Dillon Tire, Inc. v. Fifer*, 256 Neb. 147, 589 N.W.2d 137 (1999).

The doctrine of conventional subrogation is an equitable principle. See *American Nat. Bank v. Clark*, 11 Neb. App. 722, 660 N.W.2d 530 (2003). In appellate review of an action for declaratory judgment in an equity action, the standard of review for an equity case applies. See *OB-GYN v. Blue Cross*, 219 Neb. 199, 361 N.W.2d 550 (1985). In an appeal of an equitable action, an appellate court tries factual questions *de novo* on the record and reaches a conclusion independent of the findings of the trial court, provided that where credible evidence is in conflict on a material issue of fact, the appellate court considers and may give weight to the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another. *Rauscher v. City of Lincoln*, 269 Neb. 267, 691 N.W.2d 844 (2005). In an appeal from a declaratory judgment, an appellate court, regarding questions of law, has an obligation to reach its conclusion independently of the conclusions reached by the trial court. *Mason v. City of Lincoln*, 266 Neb. 399, 665 N.W.2d 600 (2003).

Despite the Wurdemans' assertions to the contrary, we find that the outcome in this case is controlled by the decision in *American Nat. Bank v. Clark*, *supra*. In that case, we held that the doctrine of conventional subrogation applies where one pays the debt of another under an agreement existing at the time of the payment, with either the debtor or the creditor, that the person paying shall be subrogated to the liens existing as security for the debt. We recognized that "[o]ne who pays or advances money to pay a mortgage debt with the understanding that he or she is to have the benefit of the mortgage becomes the holder of the lien by subrogation" *Id.* at 727-28, 660 N.W.2d at 535. We also held that whether the doctrine applies depends upon the particular facts and circumstances of the case, the principle not being enforced as a matter of right, but to subserve the ends of justice in the particular controversy under consideration. *American Nat. Bank v. Clark*, *supra*.

In *American Nat. Bank v. Clark*, *supra*, we affirmed the trial court's application of the doctrine of conventional subrogation to a factual situation that is, in relevant respects, comparable to the present case. In that case, the sellers of real property subject to three deeds of trust sold the property to purchasers. The purchasers financed the purchase by securing a loan from First Union Mortgage Corporation (First Union), the proceeds of which were used to satisfy the first two existing deeds of trust on the property. A title search had not revealed the third existing deed of trust on the property, held by American National Bank, which remained after the

purchasers' purchase of the property from the sellers. The sellers then defaulted on payments due to American National Bank, which filed a petition of foreclosure.

The issue presented to the trial court in *American Nat. Bank v. Clark*, 11 Neb. App. 722, 660 N.W.2d 530 (2003), was whether the lien held by First Union should have priority over the already existing and previously recorded lien held by American National Bank. The trial court held that, at the very least, the purchasers and First Union had an implied agreement with the sellers to be first in priority after First Union's loan proceeds were used to satisfy the first two existing mortgages. *Id.* Because First Union made the payment with the understanding and expectation that it would be substituted in the place of the creditors holding the first two deeds of trust, First Union obtained a first lien priority under the doctrine of conventional subrogation, and its interests were superior to those of American National Bank. *Id.* This was true despite American National Bank's lien already existing and having been recorded prior in time to First Union's. We affirmed the trial court's application of conventional subrogation. *Id.*

The facts of the present case are comparable in all meaningful respects. Like American National Bank in *American Nat. Bank v. Clark*, *supra*, the Wurdemans held a lien on the property at the time of the refinancing and at the time a loan was obtained to pay off a lien that had priority over the Wurdemans' lien. Like First Union, Security First (whose interest is now owned by Wells Fargo) made its loan with the understanding and expectation that the proceeds would be used to pay off a certain existing lien and with the understanding and expectation that Security First would be substituted in the place of the creditor whose lien was being satisfied. Like First Union, Security First (and now Wells Fargo) was entitled to be subrogated to the first lien priority, ahead of other lienholders who held interests junior to those of the creditor whose lien was satisfied.

We find no merit to the Wurdemans' assertions that either Security First's knowledge of the Wurdemans' lien or Security First's negligence in failing to record its lien prior to the Wurdemans filing their new lien should prevent the application of conventional subrogation on the facts of this case. The fact that Security First was aware of the Wurdemans' lien further supports the conclusion that Security First had an understanding and expectation with the Osborns that Security First would be substituted for TierOne in the first lien position when Security First made the refinancing loan. Indeed, to further assist this loan being made, the Wurdemans executed a deed of reconveyance, further making it understood that Security First would have the first lien position. We are not persuaded that this knowledge somehow undermines the essential requirement for the application of conventional subrogation--that the lender have the understanding and expectation that it will be substituted for the prior lienholder whose interest is being satisfied.

Additionally, as the district court recognized in the present case, in *American Nat. Bank v. Clark*, 12 Neb. App. 222, 670 N.W.2d 484 (2003) (*Clark II*), we rejected an argument that the application of the doctrine of conventional subrogation should be held inappropriate when the party seeking to be subrogated was guilty of negligence. In *Clark II*, we rejected such an argument, noting that the junior lienholder was not adversely affected by the negligence. Similarly, in the present case, the Wurdemans are in the same position as they would have been in if the refinancing had never occurred or if Security First had recorded its lien prior to the Wurdemans' filing of their new lien. The district court specifically, and consistently with our

opinion in *Clark II*, limited the extent of Wells Fargo's subrogation to the amount necessary to pay off the TierOne lien, leaving the Wurdemans as a junior lienholder in the same position as they were in before the efforts at refinancing occurred.

We find no merit to the Wurdemans' assertions on appeal. The district court properly applied the doctrine of conventional subrogation to the facts and circumstances of this case. As such, we affirm.

AFFIRMED.