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**STATE OF MINNESOTA  
IN COURT OF APPEALS  
A12-0684**

Infinity Trading Incorporated,  
Appellant,

vs.

Nicholas John Rukamp,  
Defendant,

BAC Home Loan Servicing, LP  
f/k/a Countrywide Home Loan Servicing, LP, et al.,  
Respondents.

**Filed February 11, 2013  
Reversed and remanded  
Ross, Judge**

Wright County District Court  
File No. 86-CV-10-5776

John G. Westrick, Westrick & McDowall-Nix, P.L.L.P., St. Paul, Minnesota (for  
appellant)

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Minneapolis, Minnesota (for respondent)

Considered and decided by Schellhas, Presiding Judge; Ross, Judge; and  
Rodenberg, Judge.

## UNPUBLISHED OPINION

**ROSS**, Judge

This case involves a mortgage-priority dispute over real property in Wright County. Deciding cross motions for summary judgment, the district court applied the doctrine of equitable subrogation to determine that a mortgage held by BAC Home Loan Servicing took priority over a previously recorded mortgage held by Infinity Trading Incorporated. Infinity challenges the application of equitable subrogation in this appeal from the district court's summary judgment decision. Because BAC delayed for four years to take any action to correct the alleged erroneous priority and the facts do not support a finding that the delay resulted from an excusable or justifiable mistake of fact that warrants equitable subrogation, we reverse and remand.

### FACTS

Nicholas Rukamp purchased real property in Wright County in 2004 with a loan from Wells Fargo Home Mortgage (WFHM) secured by a purchase-money mortgage for \$238,000. The mortgage was recorded on March 22, 2004. On February 6, 2006, Rukamp obtained a \$20,001 home equity line of credit with Wells Fargo Bank, N.A., secured by a second mortgage. The second mortgage was recorded on March 3, 2006.

But on March 1, 2006, two days before the second mortgage was recorded, Rukamp refinanced the debt that had been secured by the WFHM mortgage. He obtained a \$241,758 loan from BAC Home Loan Servicing<sup>1</sup>, secured by a mortgage that Rukamp

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<sup>1</sup> Before the assignment, BAC went by the name of Countrywide Home Loans Servicing LP. On July 1, 2011, BAC became a part of Bank of America, N.A.

executed in favor of Mortgage Electronic Registration Systems Inc. (MERS), and he used \$233,255.40 from the BAC loan to retire his WFHM debt. But the mortgage securing the refinancing loan was not recorded until March 23, 2006. Despite his having already conferred the yet-unrecorded second mortgage that he executed on February 6, Rukamp obtained the BAC refinance loan and mortgage on March 1 by representing to BAC that no unrecorded mortgages existed. As of the closing of the BAC mortgage, the recording of Rukamp's second mortgage had still not occurred, and the WFHM mortgage was satisfied with the proceeds from the BAC loan.

In 2009, Rukamp defaulted on both his second mortgage that secured his home equity line of credit and the BAC mortgage that secured his refinancing loan. MERS assigned its interest in the BAC mortgage to BAC on March 19, 2009, and the assignment was recorded on March 23, 2009. Also on March 23, BAC recorded its notice to foreclose on its mortgage. On July 7, 2009, Wells Fargo Bank recorded its notice to foreclose on its mortgage. No evidence indicates that BAC received notice of the foreclosure or sale on the second mortgage. Infinity was the successful bidder at the foreclosure sale on the second mortgage on September 17, 2009, with a bid of \$20,391.00. The certificate of sale was recorded on September 17, 2009, and Rukamp had six months to redeem. On December 10, 2009, the BAC mortgage was foreclosed in a sale to BAC for \$256,697.59. Rukamp took no steps to redeem under either foreclosure. And BAC brought no action asserting its alleged priority through equitable subrogation or on any other theory during the redemption period after Infinity's purchase.

In April 2010, Infinity sued for priority under various theories. Although the second mortgage was recorded before the BAC mortgage, BAC claimed that its mortgage was equitably subrogated to the original WFHM mortgage, which indisputably had priority over Rukamp's second mortgage. Infinity moved for partial summary judgment against BAC and for a default judgment against Rukamp. Rukamp did not defend but BAC successfully opposed the motion. The district court recognized that Infinity's mortgage was recorded before BAC's, but it applied equitable subrogation to switch the priority of the competing mortgages. It found that Infinity was not a bona fide purchaser or innocent third party and that BAC was entitled to equitable subrogation because it mistakenly believed that no unrecorded junior mortgages existed when it lent the funds to satisfy the WFHM purchase-money mortgage. BAC moved for summary judgment and Infinity renewed its motion. The district court granted BAC's motion in part, but it reserved the issue of BAC's counterclaim that it was the holder of all right to the property. After the parties stipulated to certain facts, the district court awarded the property to BAC. This appeal follows.

## **D E C I S I O N**

Infinity challenges the district court's summary judgment decision. On appeal from summary judgment we determine whether any genuine issue of material fact exists and whether the district court properly applied the law. *Dahlin v. Kroening*, 796 N.W.2d 503, 504–05 (Minn. 2011). Because the material facts are not in dispute in this case, we review the district court's application of law de novo. See *Leamington Co. v. Nonprofits' Ins. Ass'n*, 615 N.W.2d 349, 353 (Minn. 2000). The supreme court has held that

“[g]ranting equitable relief is within the sound discretion of the trial court [and] [o]nly a clear abuse of that discretion will result in reversal.” *Nadeau v. County of Ramsey*, 277 N.W.2d 520, 524 (Minn. 1979); *see also Citizens State Bank v. Raven Trading Partners, Inc.*, 786 N.W.2d 274, 277 (Minn. 2010) (reviewing grant of summary judgment involving equitable subrogation for abuse of discretion). But in *SCI Minn. Funeral Servs., Inc. v. Washburn-McReavy Funeral Corp.*, the supreme court recently held that a de novo standard applies when reviewing summary judgment on equitable issues and that *Citizens* is not necessarily controlling on the standard of review. 795 N.W.2d 855, 860–61 (Minn. 2011). It reasoned that the standard of review does not become deferential “simply because the claims at issue are for equitable relief” and opined that a “deferential standard of review might be applicable where, after balancing the equities, the district court determines not to award equitable relief.” *Id.* at 860–61. We therefore will review de novo whether the district court properly followed the law when it applied equitable subrogation to give priority to BAC’s mortgage.

Infinity argues that the recording statute, not equitable principles, should control because the district court erred by finding that it was not an innocent party. The Minnesota Recording Act protects those who, like Infinity, record their interests first:

Every conveyance of real estate shall be recorded . . . and every such conveyance not so recorded shall be void as against any subsequent purchaser in good faith and for a valuable consideration of the same real estate . . . whose conveyance is first duly recorded.

Minn. Stat. § 507.34 (2012). The act protects the diligent by prioritizing their recorded titles over those who neglected to record even previously secured interests. *See Citizens*,

786 N.W.2d at 278. If we look only to the statute, Rukamp's second mortgage would take priority with its lower recording number than the BAC mortgage. The question is whether the district court properly determined that equitable subrogation applies to alter the statutory priority and elevate the BAC mortgage to first priority.

Under the doctrine of equitable subrogation, a person who has discharged the debt of another may be granted the rights and mortgage-priority position of the satisfied creditor. *Wells Fargo Home Mortg., Inc. v. Chojnacki*, 668 N.W.2d 1, 5 (Minn. App. 2003). But equitable subrogation applies and trumps the statute only if the party seeking subrogation has acted under a justifiable or excusable mistake of fact and injury to innocent parties will otherwise result. *See Carl H. Peterson Co. v. Zero Estates*, 261 N.W.2d 346, 347–48 (Minn. 1977). We cannot affirm the district court here because BAC points us to no mistake that would justify or excuse its failure to act sooner.

We are guided chiefly by *Citizens State Bank*. In that case, the supreme court held that Citizens State Bank's failure to re-record its mortgage for 38 days after it was notified that its attempted recording was erroneous was not a justifiable or excusable mistake of fact. *Citizens*, 786 N.W.2d at 276. During the bank's 38-day period of inaction in that case, another mortgage was executed and recorded on the subject property and took first priority. *Id.* The court refused to equitably subrogate the bank's mortgage because the bank "neglected to act in a timely manner," rendering neither justifiable nor excusable its erroneous filing and its then waiting 38 days to re-record. *Id.* at 286. BAC engaged in comparable inaction.

BAC had a long period to act, but didn't. BAC appears first to have had only a brief, two-day window in which it could have recorded its mortgage after it was executed on March 1, 2006, before Rukamp's previously executed second mortgage was recorded on March 3. But it could have realized the inaccuracy of Rukamp's representation that no other mortgage existed, allowing it to act immediately or soon after the consequent priority problem occurred; it was on constructive notice of the priority problem after the second mortgage's recording on March 3, 2006, and again after its own recording of its mortgage twenty days later on March 23, 2006. BAC had another opportunity to act—a period of more than three years—when it could have discovered the priority on record and sought to resolve the problem long before Infinity bid to purchase the property at the September 17, 2009 sheriff's sale. In total, for more than four years after it executed its mortgage—even after the Wells Fargo foreclosure, the sheriff's sale to Infinity, and the expiration of the redemption period—BAC did nothing to seek a legal or equitable remedy to its knowable priority problem. This is not the kind of justifiable or excusable mistake that allows equitable subrogation to supplant the statutory rule.

The district court concluded that BAC and MERS would not have agreed to lend cash and satisfy the prior mortgage if they had known about Rukamp's intervening, unrecorded, second mortgage and that satisfying the senior mortgage when unaware of the junior mortgage constituted a justifiable or excusable mistake of fact. The rationale for this finding is sound, but it does not address BAC's failure to record its mortgage immediately, or, more significantly, to act to correct the resulting priority problem during the lengthy period after the mortgage was eventually recorded and before Infinity

purchased the property. The supreme court has held that “equity aids the vigilant, and not the negligent.” *Sinell v. Town of Sharon*, 206 Minn. 437, 439, 289 N.W. 44, 46 (1939) (quotation omitted). And equitable subrogation does not apply when the parties’ equities are equal or rights are unclear. *S. Sur. Co. v. Tessum*, 178 Minn. 495, 502, 228 N.W. 326, 329 (1929). The balancing of equities would be different if others were involved. But in this contest between Infinity, a purchaser in good faith, and BAC, a mortgage holder that failed to recognize and address a priority problem for more than three years after constructive notice of the problem, it cannot be said that equity favors BAC.

BAC maintains that Infinity is an experienced, sophisticated real estate purchaser that should have realized that an outstanding, inconsistent mortgage priority right might be asserted, and it contends that Infinity is therefore not an innocent third party or bona fide purchaser. The district court is probably correct that Infinity could have perceived that an anomaly existed in the record, but being on constructive notice of a recording anomaly is not being on notice that a prior mortgage exists. When Infinity made its bid, the record indicated that Rukamp’s second mortgage was first priority and nothing in the record informed Infinity that, after more than three years standing only in second place, BAC would eventually assert a priority claim of equitable subrogation. And even if Infinity were not an innocent party or a bona fide purchaser, BAC’s mistake must still be justifiable or excusable for equitable subrogation to apply.

The district court erred by applying equitable subrogation to give BAC mortgage priority over Infinity’s interest.

**Reversed and remanded.**