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***Bank of America, N.A. v. Felco Business Services, Inc., CA-CV 16-0099 (2017)***

Equitable subrogation is **not** a defense, or objection to, a trustee's sale and is not waivable under ARIZ. REV. STAT. §33-811(C).

Two property owners borrowed \$200,000 from Countrywide Home Loans, Inc., which was secured by a Deed of Trust ("Deed 1"). A few months later, they borrowed \$1,500,000 from Felco to improve the same property. A portion of the loan was secured with a subsequent Deed of Trust ("Deed 2"). The following year, the property owners refinanced the first loan on the property through Countrywide Home Loans' sister corporation, Countrywide Bank, which was secured by *another* Deed of Trust ("Deed 3"). Although the borrowers did not inform Countrywide Bank about Deed 2 when they refinanced the loan, Deed 3 expressly stated it must "be in the first lien position, superior to any other loans." The borrowers defaulted on their payments on the Felco loan, after which Felco issued a statement of breach and notice of trustee's sale. The trustee's sale guarantee revealed Deed 3, but showed that the deed was subordinate to Deed 2. Felco sent two notices of the trustee's sale to Countrywide Bank, which failed to respond to the notice and did not seek to enjoin the sale.

Following the trustee's sale, Bank of America acquired all Countrywide entities. Bank of America informed Felco that Deed 3 had seniority over Deed 2 before the trustee's sale and that the sale did not extinguish the senior lien. Bank of America then sued the borrowers *and* Felco, seeking a declaratory judgment that Deed 3 was the senior lien and a valid and enforceable encumbrance on the property through either the doctrine of equitable subrogation or replacement mortgage. Bank of America also sued for any excess proceeds from the trustee's sale.

The trial court granted Felco's motion for partial summary judgment, holding that Bank of America waived its right to assert the doctrine of equitable subrogation because it was required to assert its lien priority as a "defense or objection to the [trustee's] sale," and its failure to enjoin the sale and assert its priority constituted waiver. The court concluded that Felco's and Bank of America's rights in the collateral were determined at the trustee's sale and Felco was entitled to summary judgment as a matter of law.

The court of appeals reversed the award of partial summary judgment holding equitable subrogation and disputes of lien priority "do not fall within A.R.S. §33-811(C)'s ambit." Instead, the doctrine is independent of a trustee's sale and cannot be waived. "As an equitable remedy independent of a trustee's sale, equitable subrogation is neither a defense nor objection to the sale." While lien priority claims relate to the underlying security property sold, equitable subrogation does not affect the claims for title to the property or the validity of the trustee's sale. A lien's priority is determined by factors independent of the sale, and because subrogation is an equitable remedy, its application "depends upon the particular facts and circumstances of each case as it arises."

For these reasons, the Court of Appeals reversed the trial court's award of partial summary judgment and remanded the matter to the trial court to consider the factors related to the loans and decide whether equitable subrogation was appropriate.