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SUPREME COURT OF TEXAS
BLAKE A. HAWTHORNE, CLERK

Case No. _____

IN THE SUPREME COURT OF TEXAS

PNC MORTGAGE, A DIVISION OF PNC BANK, N.A. SUCCESSOR TO NATIONAL CITY BANK AND NATIONAL CITY MORTGAGE, A DIVISION OF NATIONAL CITY BANK OF INDIANA,
Petitioners,

v.

JOHN HOWARD AND AMY HOWARD,
Respondents.

On Petition for Review from the Fifth Court of Appeals,
Dallas, Texas No. 05-17-01484-CV

PETITION FOR REVIEW

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IDENTITY OF PARTIES AND COUNSEL

Pursuant to Texas Rule of Appellate Procedure 53.2(a), Petitioner certifies that the following is a complete list of all parties and counsel:

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3.	**Trial Court:**	Hon. Angela Tucker 199th Judicial District Court Collin County, Texas
4.	**Court of Appeals:**	Fifth District of Texas at Dallas Panel: Justices Molberg, Reichek and Garcia

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STATEMENT OF THE CASE

Nature of the case	**Foreclosure through equitable subrogation.** Petitioner holds a note for a refinance loan, $888,286.25 of which was used to discharge two prior mortgages on the respondents' property. Petitioner claims a right to foreclose on the property through equitable subrogation. This appeal arises from the Court of Appeals' ruling that petitioner's equitable subrogation claim is time-barred.
Trial Court	Hon. Angela Tucker, 199th District Court, Dallas County
Trial Court Disposition	Denied petitioner's right to equitable subrogation based on petitioner's negligence.
Parties on appeal	Petitioners: PNC Mortgage, a division of PNC Bank, N.A. Respondents: John Howard and Amy Howard
Court of Appeals	Court of Appeals for the Fifth District of Texas at Dallas
Participating Justices	Panel: Justices Molberg, Reichek, and Garcia Opinion: Justice Reichek
Court of Appeals Disposition	Initially, the Court of Appeals affirmed denial of equitable subrogation based on petitioner's negligence. *See PNC Mortg. v. Howard* (*Howard I*), 618 S.W.3d 75 (Tex. App.—Dallas 2019). This Court reversed that decision. *See PNC Mortg. v. Howard* (*Howard II*), 616 S.W.3d 581 (Tex. 2021). On remand from this Court, the court of appeals affirmed the trial court's judgment, denying PNC equitable subrogation, based on expiration of the statute of limitations. *See PNC Mortg. v. Howard* (*Howard III*), -- S.W.3d --, 2021 WL 4236873 (Tex. App.—Dallas 2021).

STATEMENT OF JURISDICTION

This Court has importance jurisdiction. Tex. Gov't Code § 22.001(a).

ISSUE PRESENTED

1. **Accrual date of equitable subrogation claim.** Did the court of appeals err in determining that a claim for equitable subrogation accrues upon the maturity date of the new refinance debt, rather than the maturity date of the original debt that gave rise to the right of equitable subrogation?

STATEMENT OF IMPORTANCE

The right of equitable subrogation is critical to a functioning refinance lending market. Indeed, earlier this year, this Court emphasized in its prior opinion in this case that "[s]ubrogation operates as a hedge against the risk of refinancing the outstanding amount of an existing loan, opening this credit market to borrowers." *PNC Mortg. v. Howard* (*Howard II*), 616 S.W.3d 581, 585 (Tex. 2021). The right to be equitably subrogated to a prior lender's lien gives refinance lenders extra security in their loans, and, accordingly, enhances their willingness to extend refinance loans to homeowners.

The court of appeals' decision threatens the very purpose of equitable subrogation recognized by this Court: to operate as a hedge against risk in the context of refinance lending. Specifically, the court of appeals has created a conflict—and, therefore, substantial uncertainty—in the interpretation of Texas law concerning the accrual point for the statute of limitations on equitable subrogation claims. Whether a refinance lender's equitable subrogation claim survives a statute-of-limitations defense now turns on which court decides the issue. The Dallas Court of Appeals ruled that the accrual point on a foreclosure claim made pursuant to a right of equitable subrogation is the maturity date of *the new refinance note*. *PNC Mortg. v. Howard* (*Howard III*), -- S.W.3d --, 2021 WL 4236873, at *4 (Tex. App—Dallas 2021, pet. filed). By contrast, federal district courts in Texas repeatedly have ruled

the opposite in recent years, holding that the proper accrual point is the maturity date of the *original debt* that was discharged with the proceeds of the refinance loan. *See Gillespie v. Ocwen Loan Serv'g LLC*, No. 4:14-CV-00279, 2015 WL 12582796, at *4 (S.D. Tex. Oct. 25, 2015); *Priester v. Long Beach Mortg. Co.*, No. 4:16-CV-00449, 2018 WL 1081248, at *4 (E.D. Tex. Feb. 28, 2018); *De La Cruz v. Bank of New York*, No. A-17-CV-00163-SS, 2018 WL 3018179, at *6 (W.D. Tex. June 15, 2018); *Zepeda v. Fed. Home Loan Mortg. Corp.*, No. 4:16-CV-3121, 2018 WL 781666, at *5 (S.D. Tex. Feb. 8, 2018), *rev'd on other grounds*, 967 F.3d 456 (5th Cir. 2020). An opinion by the Amarillo Court of Appeals also supports the federal approach. *See Lusk v. Parmer*, 114 S.W.2d 677, 681 (Tex. Civ. App.—Amarillo 1938, writ dism'd).

For the sake of consistency in the application of this critical feature of Texas equitable subrogation law, this Court should grant review. Otherwise, the vitality of the refinance market will be impaired as lenders, lacking clarity in how the statute of limitations will be applied if they invoke their equitable subrogation rights, will become hesitant to extend refinance loans at all.

The need for review is heightened because the court of appeals' ruling cannot be reconciled with the core feature of equitable subrogation identified by this Court—namely, that equitable subrogation puts the refinance lender "into the prior lienholder's shoes." *Fed. Home Loan Mortg. Corp. v. Zepeda*, 601 S.W.3d 763, 766

(Tex. 2020). Fixing the accrual point at the maturity date of the original debt is the only conclusion that comports with the foregoing principle and the equitable concerns underlying the doctrine of equitable subrogation. The accrual point for any claim brought by the original lender would have been the maturity date of the original loan, so that must be the accrual point for an equitable subrogation claim brought by the refinance lender. This Court should grant review to correct the court of appeals' deviation from this essential aspect of the doctrine of equitable subrogation.

STATEMENT OF FACTS

John and Amy Howard (the "Howards") took out two mortgages on their property in 2003. (CR 799). The Howards refinanced those mortgages in 2005. (CR 799). The Howards used $888,286.25 from the 2005 refinance to discharge the prior debts and associated liens from 2003. (CR 799–800). PNC holds the refinance note and is the beneficiary of the deed of trust pledging the Howards' property as collateral. (CR 802). PNC is equitably subrogated to the original 2003 deeds of trust through the refinance debt. *See Howard II*, 616 S.W.3d 581 (deciding PNC is entitled to equitable subrogation in this case).

First Franklin Financial Corporation (the "Original Lender") was the beneficiary of the original 2003 deed of trust. (CR at 799). National City Bank of Indiana ("Bank of Indiana") was the lender on the 2005 refinance note and

beneficiary of the corresponding deed of trust. (CR 799–800). In March of 2008, Bank of Indiana assigned its interests in the refinance note and deed of trust to National City Mortgage Co. ("National City Bank"). (CR 800); (RR vol. 3 at 220–22, Def.'s Ex. 10).

In November of 2008, the Howards stopped making payments on their refinance note. (CR 801). On June 19, 2009, National City Bank elected to accelerate the refinance note. (CR 1220). National City Bank later merged with PNC, at which point PNC was the holder of the refinance note and the beneficiary of the deed of trust by way of assignment. (CR 986, 1074–75).

On August 31, 2009, Amy Howard filed for Chapter 13 bankruptcy. (CR 801). During the pendency of the bankruptcy, PNC agreed to abandon the 2009 acceleration in exchange for a scheduled repayment of $25,727.56.[1] (RR vol. 3 at

[1] The court of appeals did not account for this fact in its most recent decision, despite PNC clarifying in its initial brief to that court that the 2009 acceleration was abandoned. *See* Brief of Petitioner-Appellant at 30 n.12, *Howard I*, No. 05-17-01484-CV (Tex. App.—Dallas, June 1, 2018). Instead, the court of appeals incorrectly stated that "[a]ll parties agree the [2009] acceleration of the note was proper and there is no allegation that the acceleration was abandoned." *Howard III*, 2021 WL4236873, at *1. As PNC argued in its first brief to the court of appeals, however: "[t]he abandoned 2009 acceleration is of no relevance. . . . [T]he parties stipulated at trial that the 2009 . . . [a]cceleration was properly given *at the time*, but the 2009 acceleration was subsequently abandoned . . . ." Brief of Petitioner-Appellant at 30 n.12, *Howard I*, No. 05-17-01484-CV (Tex. App.—Dallas, June 1, 2018)(emphasis added) (citations omitted). PNC argued then, and still contends now, that the 2009 acceleration was made ineffective when "the Howards made an enforceable agreement with PNC to abandon the foreclosure in consideration for the Howards' promise to make periodic payments in specified amounts [during the bankruptcy]." *Id.*; *see also Citibank N.A. v. Pechua, Inc.*, 624 S.W.3d 633, 638 (Tex. App.—Houston [14th Dist.] 2021) ("Abandonment can also be accomplished through an agreement between the parties. . . [or] when the borrower resumes making installment payments after an event of default and the lender accepts those payments. . . .").

351, Def.'s Ex. 26). The bankruptcy court entered a consent order memorializing this agreement in December 2009. (RR vol. 3 at 349–55, Def.'s Ex. 26); *In re Howard*, No. 10-40230-13 (Bankr. E.D. Tex. 2009), ECF 51, 55. The Howards paid only $1,012.50 on this agreement before defaulting in repayment. (RR vol. 3 at 307, Def.'s Ex. 20).

Amy Howard's bankruptcy was dismissed in February 2010, and the Howards remained delinquent on the refinance note. (RR vol. 3 at 303, Def.'s Ex. 19). In March 2010, Bank of Indiana, despite having already transferred away its interest in the note and deed of trust, purported to accelerate the refinance note again. (CR 802–03); (RR vol. 3 at 309–19, Def.'s Ex. 21). A substitute trustee appointed by Bank of Indiana then sold the Howards' property in an April 2010 foreclosure sale for the benefit of Bank of Indiana. (CR 803). In response, the Howards filed this wrongful foreclosure action against the Bank of Indiana, asserting that the Bank of Indiana no longer had authority to foreclose after assigning its interests in the refinance note. (CR 22–28, 803). The Howards named PNC in the action as the mortgage servicer on the loan. (CR 22–28, 803). The trial court granted, and the court of appeals affirmed, partial summary judgment against Bank of Indiana, deeming the 2010 re-acceleration and foreclosure to be legally ineffective because PNC was the holder of

the note and beneficiary of the deed of trust at the time, not Bank of Indiana.[2] (CR 518–520); *PNC Mortg. v. Howard* (*Howard I*), 618 S.W.3d 75, 83 (Tex. App.—Dallas 2019). PNC does not challenge this holding.

PNC asserted its right to equitable subrogation as a counterclaim in this wrongful foreclosure suit on January 8, 2015. (CR 152, 804). The denial of PNC's equitable subrogation claim is what gives rise to the current petition for review. PNC's right to equitable subrogation was denied by the court of appeals, then recognized by this Court, then denied again by the court of appeals on remand, this time on different grounds. *Howard I*, 618 S.W.3d at 85; *Howard II*, 616 S.W.3d at 584–85; *Howard III*, 2021 WL4236873 at *5.

In its first opinion, the court of appeals determined that PNC was not entitled to equitable subrogation because PNC negligently failed to assert its right to foreclosure on its contractual lien until five years after the defective foreclosure by Bank of Indiana. *Howard I*, 618 S.W.3d at 83–85. This Court reversed that decision, clarifying that negligence on the part of a refinance lender in enforcing its contractual rights does not vitiate the lender's equitable right to subrogation. *Howard II*, 616

[2] Because PNC abandoned the 2009 acceleration through the bankruptcy agreement and because the 2010 acceleration was erroneous, no operative acceleration of the refinance note exists in this case. The court of appeals did not address the lack of an effective acceleration, and this Court should remand the case to the court of appeals to consider the lack of an effective acceleration after deciding the accrual issue raised in this petition.

S.W.3d at 584–85. This Court then remanded the case back to the court of appeals for further proceedings. *Id.* at 585.

On remand, the court of appeals determined that PNC's equitable subrogation claim was barred by the four-year statute of limitations applicable to contractual lien foreclosures. *Howard III*, 2021 WL4236873 at *5 (citing Tex. Civ. Prac. & Rem. Code § 16.035). The remand decision reasoned that (1) the accrual point of an equitable subrogation claim is the maturity date of the refinance loan, (2) the maturity date of that refinance loan was accelerated in 2009,[3] (3) PNC did not assert its equitable subrogation claim until 2015, and, therefore, (4) PNC's claim was time-barred. *Id.* In deciding the accrual point, the court of appeals rejected the modern approach of Texas federal courts, instead citing two court of appeals cases from 1928 and 1936 that it read as consistent with its decision. *Id.* at *2–4.

SUMMARY OF ARGUMENT

This Court should grant review to ensure that the doctrine of equitable subrogation remains a clear and certain hedge against risk for refinance lenders, thereby ensuring a robust refinance market for Texas homeowners.

The court of appeals created a square conflict in the interpretation of Texas law when it held that the accrual date for an equitable subrogation claim is the

[3] As noted *supra* nn. 1–2, PNC abandoned the 2009 acceleration through the bankruptcy agreement with Amy Howard.

maturity date of the refinance debt, not the maturity date of the original debt. Federal courts in Texas have recently and repeatedly adopted the opposite rule. As a result, refinance lenders cannot know with certainty how long they have to bring an equitable subrogation claim—it all depends on which court decides the claim. This discrepancy threatens the Texas refinance market by casting uncertainty on the contours of equitable subrogation. This Court should grant this petition to restore uniformity and certainty to equitable subrogation law.

This Court also should grant review because the court of appeals' decision conflicts with the foundational legal principle underlying the doctrine of equitable subrogation articulated by this Court. As this Court recently reaffirmed in *Zepeda*, equitable subrogation strives to put refinance lenders "into the shoes" of the original lienholder. Had the original lienholder brought a foreclosure claim in connection with its lien, the accrual point for the claim would have been the maturity date of the original debt. To put the refinance lender into the shoes of the original lienholder, the accrual point for the refinance lender's equitable subrogation claim must also be the maturity date for the original debt.

ARGUMENT AND AUTHORITIES

This Court must grant review to ensure that equitable subrogation continues to facilitate a robust refinance lending market by providing a hedge against risk. Since at least 1895, "perhaps the courts of no state have gone further in applying the

doctrine of [equitable] subrogation than ha[ve] the court[s] of [Texas]." *Faires v. Cockrill*, 31 S.W. 190, 194 (Tex. 1895) *overruled on other grounds by Fox v. Kroeger*, 35 S.W.2d 679 (Tex. 1931).

In its earlier decision in this case, this Court noted that "[s]ubrogation permits a lender to assert rights under a lien its loan has satisfied when the lender's own lien is infirm." *Howard II*, 616 S.W.3d at 585. Equitable subrogation is available anytime a third party involuntarily pays the debt of another owed to a prior lender.[4] *See, e.g.*, *Mid-Continent Ins. Co. v. Liberty Mut. Ins. Co.*, 236 S.W.3d 765, 774 (Tex. 2007) (citing *Argonaut Ins. Co. v. Allstate Ins. Co.*, 869 S.W.2d 537, 542 (Tex. App.—Corpus Christi 1993, writ denied)). The century-old doctrine recognizes that, in equity, it is the debtor who should be responsible for the original debt that was legally repaid by the new lender. *Id.* Thus, the new lender, in discharging the original debt, is considered substituted to the rights held against the debtor by the original lender. *See Zepeda*, 601 S.W.3d at 766; *Kone v. Harper*, 297 S.W. 294, 297 (Tex. App.—Waco 1927, writ granted), *aff'd sub nom. Ward-Harrison Co. v. Kone*, 1

[4] Refinance lenders are treated as having "involuntarily" paid the debt of the borrower to the original lender for equitable subrogation purposes. *See, e.g.*, *Zepeda*, 601 S.W.3d 763 (Tex. 2020) (applying equitable subrogation to refinance lender); *LaSalle Bank Nat'l Ass'n v. White*, 246 S.W.3d 616, 620 (Tex. 2007)(same).

S.W.2d 857 (Tex. Comm'n App. 1928) (quoting *First Nat'l Bank v. Ackerman*, 8 S.W. 45, 47 (Tex. 1888)).

Equitable subrogation has special significance in the context of refinance lending. Indeed, this Court has noted:

> Throughout our jurisprudence, we have stressed that the doctrine of equitable subrogation works to protect homestead property. Without equitable subrogation, lenders would be hesitant to refinance homestead property due to increased risk that they might be forced to forfeit their liens. The ability to refinance provides homeowners the flexibility to rearrange debt and avoid foreclosure.

LaSalle, 246 S.W.3d at 620 (citing *Benchmark Bank v. Crowder*, 919 S.W.2d 657, 661 (Tex. 1996)).

The court of appeals' erroneous ruling that equitable subrogation claims accrue from the maturity date of the new refinance debt, rather than the old discharged debt, creates a conflict in the interpretation of Texas law on this point. The ruling also undermines the foundational legal principle underlying equitable subrogation.

I. The court of appeals' decision creates uncertainty in an area of law vital to the Texas refinance lending market.

The court of appeals' decision creates uncertainty for refinance lenders because they do not know which accrual point will apply if they file an equitable subrogation claim. As it stands today, Texas litigants will encounter precisely opposite rules of law depending on whether their case proceeds in certain Texas state

courts or Texas federal courts, each court purporting to apply Texas equitable subrogation law. *Compare Howard III*, 2021 WL 4236873 at *4 (holding that accrual runs at maturity of *new* note), *with Gillespie*, 2015 WL 12582796, at *4 (holding that accrual runs at maturity of *old* note); *Priester*, 2018 WL 1081248, at *4 (same); *De La Cruz*, 2018 WL 3018179, at *6 (same); *Zepeda*, 2018 WL 781666, at *5 (same). *See also Lusk*, 114 S.W.2d at 681 (running limitations from maturity of the original debt).

This Court cannot allow this destabilizing discrepancy to persist, especially because it pertains to a legal doctrine the Court has described as vital to the health of the Texas housing market. *See LaSalle*, 246 S.W.3d at 620. A chief function of this Court is harmonizing Texas law and providing the predictability that is the foundation of our legal system. *In re Occidental Chem. Corp.*, 561 S.W.3d 146, 160 (Tex. 2018) ("[T]his Court's primary role is to sit as the court of *last* resort in civil cases that 'present[]. . . question[s] of law that [are] important to the jurisprudence of the state." (alterations in original) (quoting Tex. Gov't Code § 22.001(a))). Refinance lenders who are unsure of how long they have to avail themselves of the right afforded by equitable subrogation will be hesitant to extend loans to homeowners. This is exactly the problem that equitable subrogation is meant to solve. *See LaSalle*, 246 S.W.3d at 620 (stating that equitable subrogation is intended to give security to refinance lenders fearful of forfeiting their property liens). This

Court should grant review to ensure uniformity in Texas law and protect the interests of lenders and homeowners alike.

II. The court of appeals' decision directly conflicts with the foundational legal principle underlying this Court's equitable subrogation jurisprudence.

Review also is warranted because the court of appeals' decision conflicts with the foundational principle underlying this Court's equitable subrogation jurisprudence.

This Court has established that equitable subrogation substitutes the refinance lender to the rights of the original lienholder. *See Zepeda*, 601 S.W.3d at 766. The court of appeals' choice of an accrual date inapplicable to the original lienholder is at odds with that notion. This Court should therefore review the case to reaffirm parity between the rights of a subrogee lender (PNC here) and a subrogor lender (the Original Lender here).

In this case, PNC was equitably subrogated to the foreclosure rights of the Original Lender by virtue of having discharged the Original Lender's note and deed of trust liens in 2005. *Howard II*, 616 S.W.3d at 585 (affirming PNC was entitled to equitable subrogation). A foreclosure action on a contractual deed of trust lien accrues upon the maturity date of the note secured by the deed of trust. *See Holy Cross Church of God in Christ v. Wolf*, 44 S.W.3d 562, 566 (Tex. 2001). From the point of accrual, a lienholder has four years to foreclose on the property which

secures the debt. Tex. Civ. Prac. & Rem. Code § 16.035. Had the Original Lender sought to foreclose on its deed of trust liens, limitations would have begun to run upon the maturity date of the original debt. Equity demands the same be true for PNC.

The court of appeals' holding to the contrary—that the accrual date was instead the maturity date of PNC's refinance loan—cannot be reconciled with this Court's prior rulings on equitable subrogation. Equitable subrogation "[i]n the mortgage context. . . allows a lender who discharges a valid lien on the property of another to step into the prior lienholder's shoes and assume that lienholder's security interest in the property. . . ." *Zepeda*, 601 S.W.3d at 766. The rights assumed by the new lender are "only those rights held by the [old lender] against [the debtor]," leaving the borrower in no different position than he was vis-à-vis the original lender. *See Mid-Continent Ins. Co.*, 236 S.W.3d at 775 (citing *Interstate Fire Ins. Co. v. First Tape, Inc.*, 817 S.W.2d 142, 145 (Tex. App.—Houston [1st Dist.] 1991, writ denied)).

In *LaSalle* and *Zepeda*, this Court fleshed out the concept of putting an equitable subrogee "into the shoes" of the equitable subrogor. In both cases, equitable subrogation permitted the subrogee to foreclose on the original lender's lien, even where the terms of the new debt extended by the subrogee violated the Texas Constitution. *See LaSalle*, 246 S.W.3d at 616; *Zepeda*, 601 S.W.3d 767–68.

In *LaSalle*, this Court held that a lender whose home-equity loan violated then-Article XVI, Section 50(a)(5)(l) of the Texas Constitution could still foreclose on the debtor's property because it was equitably subrogated to a debt discharged with the proceeds of the illegal loan. 246 S.W.3d at 620. In *Zepeda*, this Court prescribed the same result where a lender negligently failed to correct a constitutional infirmity in the new debt that it used to discharge a constitutionally valid prior debt. 601 S.W.3d at 769. In both circumstances, the position that the subrogee enjoyed by virtue of the *new loan* was wholly irrelevant. What mattered was the position that the *prior* lender, whose debt was discharged by the subrogee, enjoyed by virtue of the *prior* loan.

The into-the-shoes principle also drove this Court's decision in *Crowder*, where it similarly determined that the equitable lien arising in favor of the new lender is the exact same lien previously held by the original lender. 919 S.W.2d at 662 (confirming that equitable subrogation preserves and extends preexisting lien and transfers it to new lender rather than creating entirely new lien). In the priority-dispute context, this means that a subrogee who discharges a first-priority lien on a property acquires the same first-priority lien that was discharged, thus maintaining superiority to other junior liens on the property. *Providence Inst. for Sav. v. Sims*, 441 S.W.2d 516, 520–21 (Tex. 1969) (ruling that lender who was properly subrogated to first-priority lien held superiority over mechanic's lien that arose after

creation of first-priority lien but before subrogation of that lien). This result follows because the "[second lender] occup[ies] the same position as the [original lender] with respect to [the original] lien" and the second lender's "deed of trust d[oes] not create an entirely new lien but preserve[s] the existing lien. . . ." *Id.* at 520.

If an equitable subrogation lien's creation date is the same as the creation date of the original lien for priority purposes, so too should the maturity date be the same as the original maturity date for accrual purposes. In short, when dates are determinative of an equitable subrogation claim, the inquiry starts and ends with the dates that are relevant to the original discharged debt. Texas law answers the question of a subrogated lien's priority by looking to the date on which the *original discharged lien* was imposed. *Id.*; *see also Crowder*, 919 S.W.2d at 662 ("The [refinance] deed of trust d[oes] not create a new lien. . . . Rather, [it] preserve[s] and extend[s] the existing [original] lien."). Similarly, in deciding when PNC's cause of action for equitable subrogation accrues in this matter, this Court should look to the maturity date of the original debt, not the maturity date of the instrument that discharged that debt.

This Court has established that equitable subrogation rights do not arise through contract when a new debt is created but, rather, are derived from equity when the original debt is discharged. Thus, in *LaSalle*, the unconstitutional refinance loan was of no moment in the lender's claim for equitable subrogation because an

"equitable subrogation claim does not derive from [the] contractually refinanced debt and accompanying lien. . . . Instead, [the refinance lender]'s claim arises in equity from its prior discharge of constitutionally valid . . . liens." *LaSalle*, 246 S.W.3d at 619.[5]

If the terms of the refinance contract do not give rise to the right of equitable subrogation—so much so that a constitutional defect therein will not vitiate the right—it is illogical to look to the maturity date of the refinance debt to determine the accrual point. Instead, courts should look to the maturity date of the original discharged debt, since it is that debt's validity that determines whether a right of subrogation exists. *See Zepeda*, 601 S.W.3d at 767 (noting that only factor to consider in determining existence of equitable subrogation right is "lender's discharge of a prior, *valid* lien" (emphasis added)). If a constitutional challenge to an equitable subrogation claim sinks or swims on the terms of the original loan, then a limitations challenge to an equitable subrogation claim should sink or swim on the maturity date of the original loan.

Indeed, this Court has already reaffirmed once in *this* case that equitable subrogation rights are separate from, and therefore not contingent on, contractual

[5] *LaSalle* further explained that "[b]y definition, equitable remedies apply only when there is no remedy at law[.]" 256 S.W.3d at 619. Indeed, any refinance lender seeking equitable subrogation is not relying on its refinance contract with the lender—a subrogee only pursues equitable subrogation after its legal remedies have failed. Thus, there is no reason to look to the document underpinning the failed legal claim—the refinance note—in determining the scope of the lender's equitable remedy.

rights under the refinance note. *See Howard II*, 616 S.W.3d at 585 (ruling that "PNC's failure to take timely action on its [contractual] lien" does not "bar[] subrogation"). This Court must grant review to uphold that notion again and clarify that the maturity date of the refinance debt has no bearing on the accrual of an equitable subrogation claim.

The court of appeals' erroneous ruling in this case contradicts all the above principles developed by this Court. *Zepeda* instructs courts to put subrogees "into the shoes" of subrogors. But the court of appeals decided that PNC is bound by an accrual point that would have been totally foreign to the Original Lender. *Crowder* counsels that a subrogee takes the same lien previously held by the subrogor. Contrarily, the decision below implies that the duration of time PNC has to pursue its equitable subrogation claim does not match the duration of time the Original Lender had to pursue a claim on its lien. *LaSalle* reasoned that equitable subrogation arises in equity from the discharge of an old debt, not in contract from the creation of a new debt. Yet, the court of appeals erroneously based the applicable accrual point of PNC's equitable subrogation claim on the maturity date of the refinance debt, thereby precluding PNC from availing itself of the hedge against risk afforded by equitable subrogation. The court of appeals' decision is an anomaly in Texas law. This Court should grant the petition to correct that anomaly and protect the integrity of equitable subrogation in Texas.

PRAYER FOR RELIEF

This Court should grant this petition, reverse the court of appeals' judgment and remand to that court to apply the correct accrual point to PNC's claim for equitable subrogation.

Respectfully Submitted,

By: */s/ Mark D. Hopkins*

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CERTIFICATE OF COMPLIANCE

Petitioner certifies that pursuant to Tex. R. App. P. 9.4(i)(1), this Petition for Review (when excluding the caption, table of contents, table of authorities, signature, certificate of compliance, and certificate of service) contains: 4,421 words.

/s/ Mark D. Hopkins
Mark D. Hopkins

CERTIFICATE OF SERVICE

I hereby certify that on November 1, 2021, a true and correct copy of the above and foregoing Petition for Review was forwarded to all counsel of record by Electronic Filing Service Provider, as follows:

Via E-Service

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COUNSEL FOR RESPONDENTS

/s/ Mark D. Hopkins
Mark D. Hopkins

Case No. _____

IN THE SUPREME COURT OF TEXAS

PNC MORTGAGE, A DIVISION OF PNC BANK, N.A. SUCCESSOR TO NATIONAL CITY BANK AND NATIONAL CITY MORTGAGE, A DIVISION OF NATIONAL CITY BANK OF INDIANA,
Petitioners,

v.

JOHN HOWARD AND AMY HOWARD,
Respondents.

On Petition for Review from the Fifth Court of Appeals,
Dallas, Texas, No. 05-17-01484-CV

APPENDIX

TAB A – TRIAL COURT JUDGMENT

TAB B – COURT OF APPEALS OPINION AND JUDGMENT

TAB C – SUPREME COURT OF TEXAS OPINION AND JUDGMENT

TAB D – COURT OF APPEALS OPINION ON REMAND AND JUDGMENT

TAB A

NO. 199-01559-2010

JOHN HOWARD and AMY HOWARD	§	**IN THE DISTRICT COURT**
Plaintiffs	§	
V.	§	**199TH JUDICIAL DISTRICT**
PNC Mortgage, a Division of PNC Bank, N.A. Successor to National City Bank	§	
and	§	
National City Mortgage, a Division of National City Bank of Indiana	§	
Defendants		**COLLIN COUNTY, TEXAS**

FINAL JUDGMENT

On April 5, 2017, this cause came on to be heard and the Plaintiffs, John Howard and Amy Howard, appeared in person and by attorney of record and announced ready for trial, and PNC Mortgage, a Division of PNC Bank, N.A. Successor to National City Bank and National City Mortgage, a Division of National City Bank of Indiana, the defendants, appeared in person and by attorney of record and announced ready for trial. By agreement, the case proceeded to trial by both stipulated facts and live testimony. All questions of fact were submitted to the Court.

The Court, after hearing the evidence and arguments of counsel, is of the opinion that the Plaintiffs are entitled to their requested relief and that Defendants shall take nothing by way of their claims.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by the court that John Howard and Amy Howard have and recover their requested relief as follows:

1. IT IS ORDERED, ADJUDGED, DECLARED AND DECREED that any lien or power of sale held by PNC Mortgage, a Division of PNC Bank, N.A. Successor to National City Bank and National City Mortgage, a Division of National City Bank of Indiana on 5783 Versailles Avenue, Frisco, Texas 75034 (the "Property"), more particularly described as: LOT 17, BLOCK B, OF VILLAGES OF STONEBRIAR PARK, AN ADDITION TO THE CITY OF FRISCO, COLLIN COUNTY, TEXAS, ACCORDING TO THE REPLAT THEREOF RECORDED IN VOLUME M, PAGE 390, OF THE MAP RECORDS OF COLLIN COUNTY, TEXAS, is VOID and UNENFORCEABLE.

2. IT IS ORDERED, ADJUDGED, DECLARED AND DECREED that any Note held by PNC Mortgage, a Division of PNC Bank, N.A. Successor to National City Bank and National City Mortgage, a Division of National City Bank of Indiana relating to 5783 Versailles Avenue, Frisco, Texas 75034 (the "Property"), more particularly described as: LOT 17, BLOCK B, OF VILLAGES OF STONEBRIAR PARK, AN ADDITION TO THE CITY OF FRISCO, COLLIN COUNTY, TEXAS,

ACCORDING TO THE REPLAT THEREOF RECORDED INVOLUME M, PAGE 390, OF THE MAP RECORDS OF COLLIN COUNTY, TEXAS, is VOID and UNENFORCEABLE.

3. IT IS ORDERED, ADJUDGED AND DECREED that the Court's August 31, 2015 partial summary judgment order is incorporated herein and is made final by this reference.

IT IS FURTHER ORDERED ADJUDGED AND DECREED by the court that John Howard and Amy Howard have and recover from PNC Mortgage, a Division of PNC Bank, N.A. Successor to National City Bank and National City Mortgage, a Division of National City Bank of Indiana attorney's fees in the sum of $75,000.00 for services rendered through the trial of this case. In the event of an appeal by PNC Mortgage, a Division of PNC Bank, N.A. Successor to National City Bank and National City Mortgage, a Division of National City Bank of Indiana to the court of appeals, if the appeal is unsuccessful, John Howard and Amy Howard will be further entitled to $15,000 as a reasonable attorney's fee; in the event of an appeal by PNC Mortgage, a Division of PNC Bank, N.A. Successor to National City Bank and National City Mortgage, a Division of National City Bank of Indiana to the Supreme Court of Texas, if the appeal is unsuccessful, John Howard and Amy Howard will be entitled to an additional $15,000.

IT IS FURTHER ORDERED that the total amount of the judgment here

rendered will bear interest at the rate of five percent, 5%, from the date of Judgment until paid.

All costs of court spent or incurred in this cause are adjudged against PNC Mortgage, a Division of PNC Bank, N.A. Successor to National City Bank and National City Mortgage, a Division of National City Bank of Indiana, Defendants.

All writs and processes for the enforcement and collection of this judgment or the costs of court may issue as necessary.

Other than this Final Judgment, and the relief granted in the Court's Order for Partial Summary Judgment granted on August 31, 2015, all relief requested in this case and not expressly granted is DENIED. This judgment finally disposes of all parties and claims and is appealable.

Signed on October 11, 2017.

JUDGE PRESIDING

TAB B

REVERSE and REMAND in part; AFFIRMED in part; and Opinion Filed June 24, 2019

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-17-01484-CV

PNC MORTGAGE, A DIVISION OF PNC BANK, N.A. SUCCESSOR TO NATIONAL CITY BANK, AND NATIONAL CITY MORTGAGE, A DIVISION OF NATIONAL CITY BANK OF INDIANA, Appellants
V.
JOHN HOWARD AND AMY HOWARD, Appellees

On Appeal from the 199th Judicial District Court
Collin County, Texas
Trial Court Cause No. 199-01559-2010

MEMORANDUM OPINION

Before Justices Whitehill, Molberg, and Reichek
Opinion by Justice Reichek

In this suit concerning the default on a note and foreclosure sale of a private home, PNC Mortgage, a division of PNC Bank, N.A. successor to National City Bank ("PNC"), and National City Mortgage, a division of National City Bank of Indiana ("Bank of Indiana"), appeal a partial summary judgment in favor of John and Amy Howard on their claims against Bank of Indiana. PNC also appeals the final judgment following a bench trial on stipulated facts ordering that it take nothing by its claims against the Howards. In four issues, the banks generally contend the trial court erred in its application of the law to the undisputed summary judgment evidence and stipulated facts and in failing to file findings of fact and conclusions of law. For the reasons that

follow, we affirm the trial court's judgment in part, reverse and render in part, and remand for further proceedings consistent with this opinion.

Factual and Procedural Background

The undisputed facts relevant to our resolution of this appeal are as follows. In March 2003, the Howards purchased a home in Frisco, Texas and obtained two purchase money lien mortgages from First Franklin Financial Corporation. On March 24, 2005, the Howards entered into a loan refinance transaction with Bank of Indiana. In connection with the refinancing, the Howards executed a note and deed of trust on the property in favor of Bank of Indiana. The Howards then used the loan proceeds they obtained from Bank of Indiana to pay off the mortgage debts they owed to First Franklin.

On March 4, 2008, Bank of Indiana assigned the note and deed of trust to National City Mortgage Co., a subsidiary of National City Bank located in Ohio (National City Bank). The assignment was recorded in the Collin County Records.

The Howards stopped making payments on the note after November 1, 2008 and defaulted under the note's terms. On January 20, 2009, National City Bank sent notices of default and intent to accelerate to both John and Amy Howard. On that date, National City Bank was the servicer and holder of the note and deed of trust. On June 19, 2009, National City Bank, as servicer and holder of the note and deed of trust, sent the Howards notices of acceleration through its attorneys. On the same day that National City Bank accelerated the note, Bank of Indiana, which had previously assigned the note and deed of trust to National City Bank, appointed Greg Bertrand as a substitute trustee to conduct a foreclosure sale of the Howard's property.

In November 2009, National City Bank was merged into PNC and PNC became the servicer of the Howard's note. Four months later, in March 2010, Bank of Indiana, through its attorneys, sent a notice of acceleration to Amy Howard. The notice listed Bank of Indiana as the

mortgagee and PNC as the mortgage servicer. On April 6, 2010, Bertrand sold the Howard's property at a nonjudicial foreclosure sale on behalf of Bank of Indiana. According to the substitute trustee's deed, the property was sold on behalf of, and also purchased by, Bank of Indiana.

Ten days later, the Howards filed this suit against Bank of Indiana and PNC seeking to set aside the foreclosure sale and resulting substitute trustee's deed. In their petition, the Howards asserted the foreclosure was void because Bank of Indiana was not the mortgagee at the time it appointed the substitute trustee and held no interest in the deed of trust at the time the property was sold on its behalf.

Almost four years later, in February 2014, the Howards filed a motion for partial traditional summary judgment against Bank of Indiana. In the motion, the Howards argued the foreclosure sale was void because the sale was both noticed by and conducted on behalf of Bank of Indiana, which had assigned its interest in the note and deed of trust to another bank prior to the foreclosure. The Howards further contended the foreclosure by Bank of Indiana violated the terms of the deed of trust which stated that a substitute trustee could only be appointed by the lender and, at the time the substitute trustee was appointed, the lender was National City Bank, not Bank of Indiana. In support of their motion, the Howards submitted documents including the note, the deed of trust, the assignment of the deed of trust from Bank of Indiana to National City Bank, the substitute trustee appointment signed by a representative of Bank of Indiana, and the notice of substitute trustee sale and the substitute trustee's deed listing Bank of Indiana as the mortgagee.

Although the motion was directed solely at Bank of Indiana, both PNC and Bank of Indiana filed a response arguing the Howards had asserted "a cause of action without recognition in Texas" and they were attempting to sidestep the elements of a wrongful foreclosure claim under section 51.002 of the Texas Property Code. The banks further construed the Howards' motion as challenging the validity of the chain of assignments of the note and deed of trust and contended

the Howards failed to produce any evidence that would allow the trial court to declare that "Defendants were neither the holder nor the owner of the loan." Neither PNC nor Bank of Indiana submitted any summary judgment evidence in support of their response.

In their reply to the banks' response, the Howards noted that their motion was not directed at PNC or any interest it might have in the loan. The motion was directed solely at Bank of Indiana because that was the entity that foreclosed on their property after assigning away its rights in the note and deed of trust. Following a hearing, the trial court granted the Howards' motion and rendered judgment declaring the foreclosure sale void ab initio.

On January 8, 2015, PNC and Bank of Indiana filed an amended answer and, for the first time, asserted counterclaims against the Howards seeking relief including a declaratory judgment for contractual and equitable subrogation and foreclosure of the equitable lien. Four months later, in May 2015, PNC filed a separate lawsuit against the Howards seeking damages for their failure to perform their obligations under the note. The Howards answered and asserted the affirmative defense of limitations. The suit on the note was consolidated into this cause in October 2016.

On April 3, 2017, the parties filed a joint motion for judgment on an agreed statement of facts, but reserved the right to introduce additional evidence at trial. A bench trial was conducted on April 5, at which the Howards rested on the stipulated facts. PNC and Bank of Indiana called both John and Amy Howard as witnesses and elicited testimony concerning amounts owed on the note, the refinancing of the loan in 2005, notices sent to the Howards, and Amy Howard's bankruptcy. Based on the evidence presented, the trial court rendered judgment that PNC and Bank of Indiana take nothing by their claims against the Howards and ordered that the note and lien on the Howards' property were void and unenforceable. The judgment further incorporated the partial summary judgment rendered in favor of the Howards and awarded the Howards $75,000

in attorney's fees. All other relief requested in the case was denied. PNC and Bank of Indiana then brought this appeal.

Analysis

I. Summary Judgment on the Foreclosure

In their second issue, PNC and Bank of Indiana contend the trial court erred in granting the Howards' motion for partial summary judgment. We review the grant of a summary judgment de novo. *Travelers Ins. Co. v. Joachim*, 315 S.W.3d 860, 862 (Tex. 2010); *Spicer v. Tex. Workforce Comm'n*, 430 S.W.3d 526, 532 (Tex. App.—Dallas 2014, no pet.). A movant for traditional summary judgment has the burden of showing there is no genuine issue of material fact and it is entitled to judgment as a matter of law. TEX. R. CIV. P. 166a(c); *Nixon v. Mr. Prop. Mgmt. Co.*, 690 S.W.2d 546, 548–49 (Tex. 1985); *Spicer*, 430 S.W.3d at 532; *McCoy v. Texas Instruments, Inc.*, 183 S.W.3d 548, 553 (Tex. App.—Dallas 2006, no pet.). We consider the summary judgment evidence in the light most favorable to the non-movant. *Mann Frankfort Stein & Lipp Advisors, Inc. v. Fielding*, 289 S.W.3d 844, 848 (Tex. 2009); *Spicer*, 430 S.W.3d at 532. When a plaintiff establishes his right to summary judgment as a matter of law, the burden then shifts to the defendant as non-movant to present evidence that raises a genuine issue of material fact, thereby precluding summary judgment. *Boudreau v. Fed. Tr. Bank*, 115 S.W.3d 740, 743 (Tex. App.—Dallas 2003, pet. denied).

The trial court in this case granted summary judgment against Bank of Indiana and declared the foreclosure on the Howards' property void ab initio. One of the grounds asserted in the summary judgment motion was that Bank of Indiana had no authority to appoint a substitute trustee and foreclose on the property because it transferred all beneficial interest in the note and deed of trust to National City Bank before it instituted foreclosure proceedings. This assignment was recorded in the Collin County Records. Pursuant to Texas law, a nonjudicial foreclosure may be

initiated by the current mortgagee. *Santiago v. BAC Home Loans Servicing, L.P.*, 20 F. Supp. 3d 585, 589 (W.D. Tex. 2014). If the security interest has been assigned of record, the current mortgagee is the last person to whom the security interest has been assigned of record. TEX. PROP. CODE ANN. § 51.0001(4)(C). The Howards provided summary judgment evidence that Bank of Indiana assigned its security interest in the Howard property to National City Bank before the Howards defaulted on the note. The summary judgment evidence also showed that, at the time the note was accelerated, National City Bank was the mortgagee. The evidence showed, therefore, that Bank of Indiana was not the current mortgagee and could not initiate foreclosure proceedings. *See Santiago*, 20 F. Supp. 3d at 589.

Because it was not the mortgagee, Bank of Indiana also had no authority to appoint a substitute trustee to conduct the foreclosure. This Court addressed a similar situation in *Burnett v. Manufacturers Hanover Trust Co.*, 593 S.W.2d 755 (Tex. App.—Dallas 1979, writ ref'd n.r.e.). In *Burnett*, the original mortgagee on a loan for real property appointed a substitute trustee to foreclose on the property after it had assigned the note to another entity. *Id*. at 756. The deed of trust required the appointment of the substitute trustee to be made by the holder of the note. *Id*. at 757. Because the original mortgagee was no longer the holder of the note, we concluded its appointment of the substitute trustee violated the terms of the deed of trust. *Id*. at 758. A foreclosure sale that is not conducted within the authority conferred by the deed of trust is void. *See id.* at 757.

In this case, the deed of trust stated that a substitute trustee may be appointed by the "Lender." The summary judgment evidence showed that, at the time of the foreclosure, National City Bank was the current lender. Under the terms of the deed of trust, therefore, Bank of Indiana had no authority to appoint the substitute trustee. We conclude the Howards met their burden to

show their entitlement to summary judgment as a matter of law. The burden then shifted to the Bank of Indiana to present evidence sufficient to raise a genuine issue of material fact.

As noted above, PNC and Bank of Indiana filed a joint response to the Howards' motion, but submitted no evidence in support. Instead, the banks argued the Howards failed to provide proof that a wrongful foreclosure occurred under section 51.002 of the Texas Property Code.[1] The banks further asserted the Howards had no standing to challenge the assignment of the note and deed of trust. But, as the banks now concede, the Howards' claim that Bank of Indiana had no authority to foreclose on their property was not a claim for wrongful foreclosure under section 51.002 of the property code. And the Howards relied upon, rather than challenged, the assignment of the note and deed of trust to support their right of recovery.

On appeal, the banks now assert for the first time that PNC simply misidentified itself as Bank of Indiana in the foreclosure proceedings and the trial court "failed to appreciate that . . . Bank of Indiana, National City Bank, and PNC were all merged with and into each other." On that basis, the banks contend the trial court erred in determining in its summary judgment ruling that PNC, as the successor bank, lacked authority to foreclose on the Howards' property. This argument is misdirected because the trial court made no such determination. The trial court determined only that *Bank of Indiana* lacked authority in April 2010 to appoint a substitute trustee and foreclose on the property because Bank of Indiana had no right, title, or interest in the note or deed of trust at that time. The banks do not challenge this finding.

To the extent the trial court "failed to appreciate" that Bank of Indiana merged into National City Bank, and then PNC, this is because the banks never submitted any evidence or made any arguments regarding an alleged merger or a purported "misidentification," as a reason to deny the

[1] Section 51.002 governs the manner in which foreclosure sales are conducted and sets forth requirements concerning, among other things, notices and when and where the sale must occur. TEX. PROP. CODE ANN. § 51.002.

Howards' motion for summary judgment. We note that PNC and Bank of Indiana have been listed and treated as separate parties, not merged entities, throughout the proceedings in this case. We cannot reverse a summary judgment on a ground not raised below. *Pinnacle Anesthesia Consultants, P.A. v. St. Paul Mercury Ins. Co.*, 359 S.W.3d 389, 398 (Tex. App.—Dallas 2012, pet. denied); *Shih v. Tamisea*, 306 S.W.3d 939, 944 (Tex. App.—Dallas 2010, no pet.) (except to attack legal sufficiency of movant's grounds, non-movant must expressly present to trial court any reason for avoiding movant's entitlement to summary judgment).

The banks point to one reference to the mergers in the summary judgment proceedings to argue that the issue was sufficiently raised in the trial court. This reference is in a footnote on the first page of a motion for summary judgment the banks filed nearly a year after the Howards filed their motion. There are several reasons why this footnote did not sufficiently raise the merger and misidentification issues to either defeat the Howard's motion for summary judgment or preserve these issues for review on appeal.

First, although the trial court conducted hearings on both motions for summary judgment before granting the Howards' motion, the trial court's order states it considered only the Howards' motion in making its ruling. The record does not reveal any ruling on the banks' motion.

Even if the trial court considered the banks' motion for summary judgment before granting the Howards' motion, the footnote outlining the mergers was for identification purposes only and bore no relevance to the grounds asserted by the banks for summary judgment. The banks made no argument regarding an alleged misidentification in the foreclosure documents or the effect of the alleged merger of Bank of Indiana with National City Bank and PNC on the Howards' claim against Bank of Indiana. Indeed, the banks make no argument even on appeal regarding the effect of the alleged misidentification other than to assert it occurred.

Next, the banks did not submit any summary judgment evidence in support of their merger assertions. Mere assertions are insufficient to create a fact issue precluding summary judgment. *Boudreau*, 155 S.W.3d at 743. Although the banks suggest the trial court could have taken judicial notice of the mergers, they never requested it do so. Nor did they present any arguments that might have prompted the trial court to do so sua sponte.

Finally, the footnote on which the banks rely does not state when any of the mergers took place. Accordingly, the trial court was not provided with any information in the summary judgment proceedings from which it could have concluded that Bank of Indiana merged with National City Bank and/or PNC before it commenced foreclosure proceedings on the Howards' property. In other words, there is nothing in the footnote to suggest the mergers occurred during a time period that would impact the Howards' claim that Bank of Indiana had no interest in the note and deed of trust at the time it foreclosed.

As a separate basis to reverse the summary judgment, the banks argue the summary judgment evidence shows that PNC "adequately designated" a substitute trustee under the terms of the deed of trust by having the trustee's law firm send a notice of acceleration to Amy Howard in March 2010. As with the banks' arguments concerning the alleged mergers and misidentification, this reason to deny the Howards' motion for summary judgment was never presented to the trial court. Even if we consider the argument as a challenge to the legal sufficiency of the Howards' grounds for summary judgment, and even if we consider the March 2010 notice of acceleration to be an effective appointment of a substitute trustee, PNC does not address the fact that the acceleration notice states PNC was acting in its capacity as mortgage servicer for Bank of Indiana, not as the lender, in authorizing the substitute trustee to foreclose. In fact, PNC later stipulated at trial that the March 2010 notice of acceleration was sent by Bank of Indiana, not PNC. Accordingly, this notice does not raise a genuine issue of material fact as to the Howards' claim

that Bank of Indiana appointed the substitute trustee in violation of the terms of the deed of trust. *See Burnett*, 593 S.W.2d at 758.

In their last challenge to the summary judgment, the banks contend the Howards failed to prove the elements of "wrongful foreclosure" as a matter of law because they did not show any irregularity in the sale process or that the sale resulted in an inadequate sales price. In a footnote to their brief, the banks acknowledge that the Howards' claim alleging the foreclosure sale was conducted without authority is different than a claim alleging wrongful foreclosure based on irregularities occurring within the sale. The banks go on to assert, however, without argument or authority, that PNC's misidentification of itself as Bank of Indiana in the foreclosure documents was an irregularity in the sale proceeding requiring the Howards to show an inadequate sale price. The failure to specifically argue and analyze one's position or provide authorities waives any error on appeal. *In re B.A.B.*, 124 S.W.3d 417, 420 (Tex. App.—Dallas 2004, no pet.). And again, PNC never argued or presented any evidence in the summary judgment proceedings below to show that the foreclosure conducted on behalf of Bank of Indiana was the result of a misidentification. We conclude the banks failed to raise a genuine issue of material fact to defeat the Howards' motion for summary judgment and the trial court properly declared the foreclosure sale by Bank of Indiana void. We resolve the banks' second issue against them.

II. Equitable Subrogation

In their third issue, the banks contend the trial court erred in failing to grant judgment in favor of PNC following the bench trial on its claim for equitable subrogation because PNC's right to subrogation was established by the stipulated evidence. According to the banks, to the extent the Howards used the proceeds of the loan they obtained from Bank of Indiana to pay off their mortgage debt with First Franklin in the 2005 refinancing transaction, the banks became subrogated to First Franklin's rights and assumed their lien position. The banks argue, therefore,

that PNC now has a valid equitable lien on the Howard's property and it should be allowed to foreclose this lien.

PNC is asserting an equitable lien, rather than seeking to foreclose the lien created by the deed of trust executed as part of the loan refinancing transaction, because, as counsel for the banks stated at trial, they "admittedly have a limitations problem." The banks stipulated before trial that National City Bank, as the holder of the note and deed of trust at the time the Howards defaulted, properly accelerated the note on June 19, 2009. Once a note is accelerated, the cause of action for foreclosure of the deed of trust lien securing the note accrues and the sale of the property must occur within four years. TEX. CIV. PRAC. & REM. CODE ANN. § 16.035(b); *Holy Cross Church of God in Christ v. Wolf*, 44 S.W.3d 562, 574 (Tex. 2001). When the four-year period expires, the real-property lien, and the power of sale to enforce the lien, become void. *See Wolf*, 44 S.W.3d at 567.

The acceleration by National City Bank was effective as to PNC as the subsequent holder of the note and deed of trust. *Id*. It is undisputed that PNC asserted no lien claims against the Howards until January 2015, more than five years after the note was accelerated. The banks contend this limitations issue does not affect PNC's equitable lien claim because a subrogation cause of action does not accrue until the maturity date of the underlying debt that was paid off in the refinancing.[2] *See Gillespie v. Ocwen Loan Servicing, LLC*, No. 4:14-cv-00279, 2015 WL 12582796, at *4 (S.D. Tex. Oct. 28, 2015).

A party asserting a claim for equitable subrogation bears the burden of establishing entitlement to it. *Murray v. Cadle*, 257 S.W.3d 291, 300 (Tex. App.—Dallas 2008, pet. denied). When determining whether a party is entitled to equitable subrogation, the trial court must balance

[2] The banks do not specify the maturity date of the underlying debt, nor point us to anywhere in the record where such date could be determined. Nevertheless, we will assume for purposes of this discussion that the banks filed their equitable lien claims within the limitations period.

the equities in view of the totality of the circumstances. *Id*. The trial court has discretion in deciding cases involving equitable relief, and we will not disturb the trial court's balancing unless it is shown it would be inequitable to do so. *Id*. The Howards argued at trial, and contend again on appeal, that PNC is not entitled to an equitable lien because its inability to foreclose on the lien created by the deed of trust is due entirely to the banks' refusal to acknowledge their error in having the wrong bank foreclose in 2010 and their failure to remedy this error by having the correct bank foreclose within the period dictated by the statute of limitations.

Among the factors the court may consider in conducting its balancing test is the negligence of the party claiming subrogation. *Id*.; *see also Providence Inst. for Savs. v. Sims*, 441 S.W.2d 516, 519 (Tex. 1969) (negligence on part of party seeking subrogation of some importance when right is wholly dependent on equitable principles). Such negligence may take the form of carelessness or sloppiness in the pursuit or protection of the party's rights. *In re Okedokun*, 593 B.R. 469, 548 (Bankr. S.D. Tex. 2018). For example, in *Zapeda v. Federal Home Loan Mortgage Ass'n*, the trial court concluded the lender was not entitled to equitable subrogation because the lender was afforded ample notice and opportunity to cure the defect in its contractual lien and failed to do so. No. 4:16-cv-3121, 2018 WL 781666, at *8 (S.D. Tex. Feb. 8, 2018). According to the court, rather than simply curing the problem, the lender chose to send the borrower a "nonsense response" that failed to address or cure the issue. *Zapeda*, 2018 WL 1947848, at *2 (S.D. Tex. April 25, 2018).

Similarly, in this case, the Howards notified the banks ten days after the foreclosure sale that the wrong bank had conducted the foreclosure. At that point, the banks had more than three years to correct the problem before the statute of limitations expired. Instead, the banks responded, without any legal basis, that the Howards' claim was "a cause of action without recognition in Texas." PNC chose to wait almost five years after being notified of the issue, and five-and-a-half

years after the note was accelerated, to seek foreclosure on the property in the name of the correct bank. The statute of limitations on foreclosures would be rendered meaningless if lenders could always avoid it simply by claiming equitable subrogation. *See id*. Based on the parties' pleadings and the stipulated facts, we conclude the trial court did not abuse its discretion in refusing to award PNC the equitable relief it sought. We resolve the banks' third issue against them.

III. Suit on the Note

In their fourth issue, the banks contend the trial court erred in failing to grant judgment in favor of PNC on its suit to recover on the note because the stipulated facts established its right to collect. The stipulated facts demonstrate, and the Howards do not dispute, that they defaulted on the note in 2008 and the note was properly accelerated in June 2009. PNC filed its suit to recover on the note in May 2015. The only affirmative defense the Howards raised to recovery on the note was that the claim was barred by the statute of limitations. The Howards bore the burden at trial of proving their limitations defense. *See Woods v. William M. Mercer, Inc.*, 769 S.W.2d 515, 517 (Tex. 1988).

The Howards contend that the banks' claim to recover on the note is barred by the four-year statute of limitations applicable to suits on a debt under section 16.004 of the civil practice and remedies code. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 16.004. The banks respond that PNC's claim is governed by the limitations period found in section 3.118 of the Texas Business and Commerce Code, which states that "an action to enforce the obligation of a party to pay a note payable at a definite time must be commenced within six years after the due date or dates stated in the note or, if a due date is accelerated, within six years after the accelerated due date." *See* TEX. BUS. & COM. CODE ANN. § 3.118(a). Because PNC filed its suit within six years of the date the note was accelerated, the banks contend the action was filed timely.

Where there is a debt secured by a note, which is in turn, secured by a lien, the note and lien constitute separate obligations. *See Aguero v. Ramirez*, 70 S.W.3d 372, 374 (Tex. App.—Corpus Christi–Edinburg 2002, pet. denied). Although the real property lien may be time barred, the lender may still recover on the note under the six-year limitations period applicable to negotiable instruments. *Id*. The Howards argue the six-year limitations period does not apply in this case because the note at issue is not a negotiable instrument.

The negotiability of an instrument is a question of law. *Great N. Energy Inc. v. Circle Ridge Prod., Inc.*, 528 S.W.3d 644, 660 (Tex. App.—Texarkana 2017, pet. denied). A "negotiable instrument" is an "unconditional promise or order to pay a fixed amount of money, with or without interest or other charges described in the promise or order, if it . . . does not state any other undertaking or instruction by the person promising or ordering payment to do any act in addition to the payment of money. . . ." TEX. BUS. & COM. CODE ANN. § 3.104(a). An exception to this restriction on undertakings is that the promise or order may contain "an undertaking or power to give, maintain, or protect collateral to secure payment." *Id*. Furthermore, a promise or order is not made conditional by a reference to another record for a statement of rights with respect to collateral, prepayment, or acceleration. *Id*. §3.106(b).

The Howards assert their note is not a negotiable instrument because it contains multiple undertakings and instructions in addition to the payment of money. The Howards list nine different alleged additional undertakings that render the note non-negotiable:

> 1) the payment of late fees;
>
> 2) the reference to a deed of trust which grants additional privileges to the holder to demand immediate payment and states under what conditions the borrower may be required to make immediate payment in full;
>
> 3) the instruction that the holder will deliver or mail notices including changes in the interest rate and monthly payments;

> 4) the obligation that the borrower tells the note holder, in writing, if the borrower opts to prepay;
>
> 5) The instruction that if applicable law is finally interpreted so that the interest charged under the note or other loan charges exceed legal limits, then (a) any such loan charge shall be reduced by the amount necessary to reduce the charge to the permitted limit, and (b) any sums already collected by the lender that exceeded permitted limits shall be refunded to the borrower;
>
> 6) the instruction that the lender send written notice of default;
>
> 7) the instruction entitling the lender to be paid back by the borrower for all costs and attorney's fees;
>
> 8) the instruction that the lender send any notice that must be given to the borrower pursuant to the terms of the note by either delivering it or mailing it by first class mail; and
>
> 9) the instruction that the borrower send any notice [that] must be given to the lender pursuant to the terms of the note by either delivering it or mailing it by first class mail.

With respect to late fees, the definition of a negotiable instrument states that the promise to pay may include "interest or other charges described in the promise." TEX. BUS. & COM. CODE ANN. § 3.104(a). Late fees are clearly "other charges" that fall within the scope of the definition of a negotiable instrument. *See* William H. Burgess III, *Negotiability of Promissory Notes in Foreclosure Cases: Ballast is not Luggage*, 88-MAR Fla. B.J. 8, 15 (2014). Similarly, section 3.106(b)(i) explicitly allows a negotiable instrument to reference a separate writing, such as a deed of trust, for information concerning collateral, prepayment, or acceleration. *See* TEX. BUS. & COM. CODE ANN. § 3.106(b)(i). The reference to the deed of trust listed by the Howards as the second "additional undertaking" in the note falls squarely within the language permitted by section 3.106(b)(i) and has no effect on the note's negotiability. *See id*. § 3.106(b)(i) cmt. 1.

The third, fourth, sixth, eighth, and ninth alleged additional undertakings all concern the giving of notices. The notices involve either interest, prepayment, default, or other matters controlled by the note. In each case, the required notice is either incidental to the note's unconditional promise to pay or a permissible undertaking to maintain or protect the collateral.

See id. § 3.104(a)(3)(A). The Howards cite no authority, and we have found none, that notice provisions of this sort would render the note non-negotiable.

The Howards do not explain how the fifth item on their list, otherwise known as a usury savings clause, constitutes an additional undertaking or otherwise affects negotiability. The clause merely adjusts the amount of interest charged on the note to the readily-ascertainable permitted legal limit. The Texas Supreme Court has held that a variable interest rate does not render a promissory note non-negotiable so long as the rate is readily ascertainable by any interested person. *See Amberjoy v. Societe de Banque Privee*, 831 S.W.2d 793, 797-98 (Tex. 1992).

Finally, the provision of the note requiring the Howards to reimburse the note holder for all costs and expenses incurred in enforcing the note, like the late fees discussed above, falls under the category of "other charges described in the promise" which are specifically permitted. TEX. BUS. & COM. CODE ANN. § 3.104(a). The charges relate only to collecting on the indebtedness evidenced by the note and do not alter or expand the borrowers' obligation to pay the amount fixed by the note. As such, the provision does not impact the note's negotiability. *See* Burgess, *supra,* at 17.

Because the note at issue is a negotiable instrument, it is subject to a six-year limitations period rather than a four-year period. *See* TEX. BUS. & COM. CODE ANN. § 3.118(a); *Aguero*, 70 S.W.3d at 374. The stipulated facts and pleadings in the record show the Howards are in default on the note and PNC brought its claim to recover within six years of the date its claim accrued. Accordingly, we conclude the trial court erred in rendering judgment that the note was void and unenforceable and in failing to render judgment in favor of PNC on its claim to recover on the note. We resolve the banks' fourth issue in their favor.

IV. Findings of Fact and Conclusions of Law

Although requested by the banks, the trial court in this case did not file findings and conclusions of law. The banks request in their first issue that we instruct the trial court to file findings and conclusions so that they "may better show this Court where reversible error exists within the trial record." Given the procedural history and record in this case, we conclude findings and conclusions are neither necessary nor proper.

The validity of the 2010 foreclosure on the Howards' property was resolved by summary judgment. Findings of fact and conclusions of law are improper in a summary judgment proceeding. *See Stangel v. Perkins*, 87 S.W.3d 706, 709 (Tex. App.—Dallas 2002, no pet.).

The remainder of the case was resolved in a bench trial that was conducted almost entirely on stipulated facts. At the beginning of the trial, counsel for the banks stated that the questions being presented to the court "are basically questions of law, not so much fact." Although the Howards testified at trial, the banks do not explain how their testimony had any bearing on the claims presented. Nor do they explain how the Howards testimony presented any conflicting evidence that would require the trial court to decide a question of fact. The banks have contended on appeal that PNC's lien rights, as well as its right to recover under the note, could both be determined entirely by the stipulated facts. Generally, findings of fact and conclusions of law have no place in a trial based on stipulated facts. *See Int'l Union, United Auto., Aerospace and Agric. Implement Workers of A.-UAW, v. Gen. Motors Corp.*, 104 S.W.3d 126, 129 (Tex. App.—Fort Worth 2003, no pet.). The banks have failed to show how this case is an exception to that rule. We resolve their first issue against them.

Conclusion

Based on the foregoing, we affirm the trial court's partial summary judgment in favor of the Howards on their claim against Bank of Indiana. We further affirm the trial court's judgment declaring that any lien or power of sale held by the banks on the Howards' property is void and unenforceable. We reverse that portion of the trial court's judgment declaring the note held by PNC to be void and unenforceable and render judgment in favor of PNC on their note claim. We remand this cause to the trial court to determine the proper amount recoverable by PNC on its claim to enforce the note.

/Amanda L. Reichek/
AMANDA L. REICHEK
JUSTICE

171484F.P05

Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

PNC MORTGAGE, A DIVISION OF PNC BANK, N.A. SUCCESOR TO NATIONAL CITY BANK AND NATIONAL CITY MORTGAGE, A DIVISION OF NATIONAL CITY BANK OF INDIANA, Appellants

No. 05-17-01484-CV V.

JOHN HOWARD AND AMY HOWARD, Appellees

On Appeal from the 199th Judicial District Court, Collin County, Texas
Trial Court Cause No. 199-01559-2010.
Opinion delivered by Justice Reichek.
Justices Whitehill and Molberg participating.

In accordance with this Court's opinion of this date, the judgment of the trial court is **AFFIRMED** in part and **REVERSED** in part. We **REVERSE** that portion of the trial court's judgment declaring the note held by PNC MORTGAGE, A DIVISION OF PNC BANK, N.A., SUCCESSOR TO NATIONAL CITY BANK, to be void and unenforceable. We RENDER judgment in favor of PNC MORTGAGE, A DIVISION OF PNC BANK, N.A., SUCCESSOR TO NATIONAL CITY BANK on its claim against JOHN HOWARD and AMY HOWARD to recover on the note. In all other respects, the trial court's judgment is **AFFIRMED**. We **REMAND** this cause to the trial court for determination of the proper amounts recoverable by PNC MORTGAGE, A DIVISION OF PNC BANK, N.A., SUCCESSOR TO NATIONAL CITY BANK.

It is **ORDERED** that each party bear its own costs of this appeal.

Judgment entered June 24, 2019

TAB C

IN THE SUPREME COURT OF TEXAS

No. 19-0842

PNC MORTGAGE, A DIVISION OF PNC BANK, N.A., SUCCESSOR TO NATIONAL CITY BANK AND NATIONAL CITY MORTGAGE, A DIVISION OF NATIONAL CITY BANK OF INDIANA, PETITIONERS,

v.

JOHN HOWARD AND AMY HOWARD, RESPONDENTS

ON PETITION FOR REVIEW FROM THE COURT OF APPEALS FOR THE FIFTH DISTRICT OF TEXAS

PER CURIAM

JUSTICE GUZMAN did not participate in the decision.

A refinancing lender failed to foreclose its property lien within the statutory limitations period after the borrowers defaulted. The borrowers had used the proceeds from the refinancing to discharge two existing liens. Equitable subrogation "allows a lender who discharges a valid lien on the property of another to step into the prior lienholder's shoes and assume that lienholder's security interest in the property, even though the lender cannot foreclose on its own lien." *Fed. Home Loan Mortg. Corp. v. Zepeda*, 601 S.W.3d 763, 766 (Tex. 2020). Without the benefit of our decision in *Zepeda*, the court of appeals concluded that the refinancing lender's failure to timely foreclose its lien precluded the lender from seeking recourse through equitable subrogation.

__ S.W.3d __. Because a lender's forfeit of its lien does not preclude the lender's equitable right to assert a pre-existing lien discharged with the proceeds from its loan, we reverse and remand.

Respondents John and Amy Howard purchased a home in 2003 with two purchase-money mortgages. Two years later, the Howards refinanced these mortgages with the Bank of Indiana,[1] executing a note and deed of trust on the property in the bank's favor. Using nearly all the proceeds from the Bank of Indiana loan, the Howards paid off the two existing mortgages on their property. The Bank of Indiana later assigned the note and deed of trust to Petitioner National City Mortgage Company, a subsidiary of National City Bank. National City Bank later merged with Petitioner PNC Mortgage.[2]

In 2008, the Howards stopped making payments on the note. In January 2009, National City Bank notified the Howards of their default and of its intent to accelerate the loan if the Howards did not cure it. Five months later, National City Bank sent the Howards notices of acceleration.

Meanwhile, the Bank of Indiana initiated foreclosure proceedings, despite its previous assignment of the note to National City Bank. The Howards challenged this foreclosure on the basis that the Bank of Indiana no longer held the mortgage on the property. The Howards also added PNC as a defendant. The Howards' challenge was successful. The trial court declared the Bank of Indiana foreclosure void, leaving the Howards' claims against PNC pending.

[1] National City Mortgage, a Division of National City Bank of Indiana.

[2] PNC Mortgage, a Division of PNC Bank, N.A.

PNC then counterclaimed against the Howards, seeking foreclosure of its lien.[3] But concerned by this time that the limitations period for foreclosure on its deed of trust had passed,[4] PNC alternatively sought a judgment declaring its right to foreclosure of the underlying liens on the property through equitable subrogation. It alleged that the Howards had discharged those earlier liens with the proceeds from the note PNC held. PNC also separately sued the Howards, alleging breach of the loan agreement. The trial court consolidated the two cases. The parties then jointly moved for judgment based on stipulated facts. The trial court declared that PNC's lien and note were unenforceable, and it rendered judgment that PNC take nothing on its claims against the Howards.

PNC appealed. Pertinent here, PNC argued that the Howards had used the proceeds from the PNC refinancing loan to discharge the existing mortgages, and as a result PNC has an equitable lien.

The court of appeals affirmed the trial court on this point, rejecting PNC's assertion of an equitable right to enforce the two earlier liens. __ S.W.3d __. The court of appeals weighed PNC's equitable right of subrogation against what it deemed to be PNC's negligent conduct: the Howards' petition in 2010 had put PNC on notice that the wrong entity had foreclosed on the property, giving PNC three years within the limitations period to take corrective action. *Id.* In balancing the

[3] PNC and Bank of Indiana informed the court of appeals that "Bank of Indiana, National City Bank, and PNC were all merged with and into each other." The court of appeals observed, however, that the trial court never made such a finding, and "PNC and Bank of Indiana have been listed and treated as separate parties, not merged entities, throughout the proceedings in this case." __ S.W.3d __. Because the bank defendants' positions are the same for purposes of this appeal, we refer to them jointly as "PNC" for the remainder of the opinion.

[4] PNC stipulated that the note was properly accelerated in June 2009. "A sale of real property under a power of sale in a mortgage or deed of trust that creates a real property lien must be made not later than four years after the day the cause of action accrues." TEX. CIV. PRAC. & REM. CODE § 16.035(b).

enforceability of the existing lien against any equitable right to enforce a discharged lien, the court of appeals relied in part on the federal district court's decision in *Zepeda v. Federal Home Loan Mortgage Association*, No. 4:16-cv-3121, 2018 WL 781666 (S.D. Tex. Feb. 8, 2018), and our opinion in *Providence Institution for Savings v. Sims*, 441 S.W.2d 516 (Tex. 1969). __ S.W.3d__. The court of appeals held that, to the extent PNC held any equitable lien, it became unenforceable when PNC forfeited its own lien by failing to timely foreclose on it.[5] __ S.W.3d __.

Two months after the court of appeals' opinion, the lender in the *Zepeda* case appealed to the United States Court of Appeals for the Fifth Circuit, which in turn certified the question to us: "Is a lender entitled to equitable subrogation, where it failed to correct a curable constitutional defect in the loan documents under § 50 of the Texas Constitution?" *Zepeda v. Fed. Home Loan Mortg. Corp.*, 935 F.3d 296, 301 (5th Cir. 2019). We answered yes. *Fed. Home Loan Mortg. Corp. v. Zepeda*, 601 S.W.3d 763, 764 (Tex. 2020).

PNC petitioned this Court for review, solely contending that our opinion in *Zepeda* requires reversal. We agree.

The facts of *Zepeda* substantially mirror those in the case before us. In that case, Sylvia Zepeda purchased her homestead with a loan using the homestead as collateral, creating a mortgage lien. *Id.* Zepeda refinanced the debt four years later. *Id.* Zepeda used the proceeds from the refinancing to pay off the balance of the first loan. *Id.* Zepeda later notified the refinancing lender that its loan documents contained a constitutional defect, and she requested that

[5] The court of appeals affirmed the trial court's partial summary judgment declaring the foreclosure sale void and reversed the portion of the judgment declaring the note unenforceable, remanding the case for determination of the amount recoverable on PNC's claim to enforce the note. __ S.W.3d __. These aspects of the court of appeals' judgment are not before us.

the lender cure the defect. *Id.* The refinancing lender sold the loan without curing the defect. *Id.* After the new note holder similarly failed to cure the defect, Zepeda sued in federal court to quiet title. *Id.* at 764–65. Despite the infirmity of its own lien, the note holder claimed that equitable subrogation permitted it to assert the earlier lien because the proceeds from the note it held had been used to discharge that lien. *Id.* at 765. The federal district court concluded that the note holder was not entitled to equitable subrogation because it negligently had failed to cure the constitutional defect in its loan documents. *Id.*; *see Zepeda*, 2018 WL 781666, at *8.

In answering the Fifth Circuit's certified question, we observed that equitable-subrogation rights become fixed at the time the proceeds from a later loan are used to discharge an earlier lien. *Zepeda*, 601 S.W.3d at 766. A lender's negligence in preserving its rights under its own lien thus does not deprive the lender of its rights in equity to assert an earlier lien that was discharged using proceeds from the later loan. *See id.* Although we considered the lender's negligence in *Sims*, that analysis is limited to the lien-priority context. *Id.* at 767 n.17.

Applying *Zepeda* to this case, the court of appeals erred in concluding that PNC's failure to timely foreclose under the deed of trust bars its subrogation rights.[6] The availability of better credit terms and interest rates can make refinancing an attractive financial tool for borrowers. Subrogation operates as a hedge against the risk of refinancing the outstanding amount of an existing loan, opening this credit market to borrowers. *Id.* at 768. Subrogation permits a lender to assert rights under a lien its loan has satisfied when the lender's own lien is infirm.

[6] As we said in *Zepeda*, equitable subrogation "arises by operation of law or by implication in equity." 601 S.W.3d at 765 n.3 (quoting *Subrogation*, BLACK'S LAW DICTIONARY (11th ed. 2019)). As in *Zepeda*, we do not address whether inequitable conduct associated with the discharged lien jeopardizes the lender's subrogation rights. *See id.*

The Howards note that their original loan was a purchase-money mortgage unlike the home-equity loan at issue in *Zepeda*. This distinction does not remove PNC's subrogation rights. Such rights, however, necessarily are limited by the conditions of the discharged lien.

Nor do we agree that a statutory default—PNC's failure to take timely action on its deed of trust lien[7]—bars subrogation when a constitutional defect does not. *See id*. (reaffirming that the Texas Constitution "does not destroy the well-established principle of equitable subrogation." (quoting *LaSalle Bank Nat'l Ass'n v. White*, 246 S.W.3d 616, 619 (Tex. 2007))).

The Howards raise two other challenges. They claim that language in their deed of trust precludes PNC's exercise of subrogation rights. Alternatively, they assert that PNC's subrogation claims are also time-barred. These arguments were presented to the court of appeals but not addressed in its opinion. We remand these issues to the court of appeals for its consideration of them. TEX. R. APP. P. 53.4.[8]

* * *

Without hearing oral argument, *see* TEX. R. APP. P. 59.1, we grant PNC's petition for review. We reverse that portion of the court of appeals' judgment declaring PNC's equitable-subrogation rights unenforceable based on a determination that PNC was dilatory in enforcing its own lien. We remand to the court of appeals for further proceedings consistent with this opinion and with *Federal Home Loan Mortgage Corp. v. Zepeda*, 601 S.W.3d 763 (Tex. 2020).

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[7] TEX. CIV. PRAC. & REM. CODE § 16.035(b) (setting limitations period for foreclosures on a deed of trust lien).

[8] *See also State v. Ninety Thousand Two Hundred Thirty-Five Dollars & No Cents in U.S. Currency ($90,235)*, 390 S.W.3d 289, 294 (Tex. 2013) ("[O]rdinarily a case will be remanded to the court of appeals for further proceedings when we reverse the judgment of the appeals court and the reversal necessitates consideration of issues raised in but not addressed by that court.").

OPINION DELIVERED: January 29, 2021

IN THE SUPREME COURT OF TEXAS

No. 19-0842

PNC MORTGAGE, A DIVISION OF PNC BANK, N.A., SUCCESSOR TO NATIONAL CITY BANK AND NATIONAL CITY MORTGAGE, A DIVISION OF NATIONAL CITY BANK OF INDIANA, PETITIONERS,

v.

JOHN HOWARD AND AMY HOWARD, RESPONDENTS

ON PETITION FOR REVIEW FROM THE COURT OF APPEALS FOR THE FIFTH DISTRICT OF TEXAS

JUDGMENT

THE SUPREME COURT OF TEXAS, having heard this cause on petition for review from the Court of Appeals for the Fifth District, and having considered the appellate record and counsels' briefs, but without hearing oral argument under Texas Rule of Appellate Procedure 59.1, concludes that the court of appeals' judgment should be reversed in part.

IT IS THEREFORE ORDERED, in accordance with the Court's opinion, that:

1) The portion of the court of appeals' judgment affirming the portions of the district court's judgment declaring that any lien or power of sale held by Respondents is void and unenforceable is reversed;

2) The remaining portions of the court of appeals' judgment remain in effect;

3) The cause is remanded to the court of appeals for further proceedings consistent with this Court's opinion; and

5) Petitioner shall recover, and Respondents shall pay, the costs incurred in this Court.

Copies of this judgment and the Court's opinion are certified to the Court of Appeals for the Fifth District and to the 199th Judicial District Court of Collin County, Texas, for observance.

Opinion of the Court delivered Per Curiam.

Justice Guzman did not participate in the decision.

January 29, 2020

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TAB D

AFFIRMED and Opinion Filed September 17, 2021

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-17-01484-CV

PNC MORTGAGE, A DIVISION OF PNC BANK, N.A. SUCCESSOR TO NATIONAL CITY BANK AND NATIONAL CITY MORTGAGE, A DIVISION OF NATIONAL CITY BANK OF INDIANA, Appellants
V.
JOHN HOWARD AND AMY HOWARD, Appellees

On Appeal from the 199th Judicial District Court
Collin County, Texas
Trial Court Cause No. 199-01559-2010

OPINION ON REMAND

Before Justices Molberg, Reichek, and Garcia
Opinion by Justice Reichek

On remand, the Texas Supreme Court has directed us to consider two issues: (1) whether the equitable subrogation lien claim asserted in this case is time-barred and (2) whether language in the deed of trust precludes assertion of the subrogation claim. *See PNC Mortg. v. Howard* ("*Howard II*"), 616 S.W.3d 581, 585 (Tex. 2021) (per curiam). Because we conclude the subrogation lien claim brought by PNC Mortgage, a division of PNC Bank, N.A. ("PNC"), is barred by the applicable statute of limitations, we affirm the trial court's judgment declaring any lien or power of

sale held by PNC on the subject property void and unenforceable. Based on our resolution of the first issue, it is unnecessary for us to address the second issue.[1]

The relevant, undisputed facts are as follows. John and Amy Howard purchased a home in 2003 with two purchase-money mortgages. Two years later, the Howards refinanced these mortgages and executed a new note and deed of trust on the property. Using nearly all the proceeds from the refinancing loan, the Howards paid off the two existing mortgages. The new note and deed of trust were later assigned to National City Bank.

In 2008, the Howards stopped making payments on the note. In January 2009, National City Bank notified the Howards they were in default and, unless they cured the default, the maturity date of the loan would be accelerated. The note was then accelerated on June 19, 2009. Shortly thereafter, National City Bank merged with PNC.

All parties agree the acceleration of the note was proper and there is no allegation that the acceleration was abandoned. PNC does not dispute that National City Bank's acceleration is binding on it as the successor in interest on the note and deed of trust. PNC did not initiate foreclosure proceedings against the Howards until more than five years after the note was accelerated. In response to PNC's claim for

[1] We note the Howards have stated in their supplemental briefing that "the Supreme Court opinion [in *Howard II*], at least by implication, renders the Howards' argument regarding the language of the deed of trust as having eliminated PNC's ability to seek enforcement of the lien non-viable."

foreclosure, the Howards asserted various affirmative defenses including the statute of limitations.

Under section 16.035 of the Texas Civil Practice and Remedies Code, a suit for foreclosure of a real property lien must be brought within four years after the cause of action accrues. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 16.035. A cause of action to foreclose on a real property lien accrues when the loan is accelerated. *Khan v. GBAK Props., Inc.*, 371 S.W.3d 347, 353 (Tex. App.—Houston [1st Dist.] 2012, no pet.); *see also GMAC v. Uresti*, 553 S.W.2d 660, 663 (Tex. App.—Tyler 1977, writ ref'd n.r.e.) ("acceleration" is the change of maturity of a note from future to present). Because PNC did not seek foreclosure until more than five years after the debt was accelerated, PNC's ability to foreclose its deed of trust lien was barred by the statute of limitations. *Id*. PNC does not challenge this result. *See PNC Mortg. v. Howard* ("*Howard I*"), 618 S.W.3d 75, 83–84 (Tex. App.—Dallas 2019), *rev'd on other grounds*, 616 S.W.3d at 585 (Tex. 2021).

Instead, PNC asserts it is entitled to foreclose on the Howards' property based on the doctrine of equitable subrogation. Equitable subrogation allows a third-party who discharges a lien on the property of another to step into the original lienholder's shoes and assume that lienholder's security interest on the property. *LaSalle Bank Nat'l Ass'n v. White*, 246 S.W.3d 616, 619 (Tex. 2007) (per curiam). Under this doctrine, if the contractual lien created as part of the refinancing is infirm for some

reason, the lender can assert whatever lien rights were held by the previous lender whose loan was paid off. *Howard II*, 616 S.W.3d at 585.

Recently, in *Federal Home Loan Mortgage Corp. v. Zepeda*, 601 S.W.3d 763, 769 (Tex. 2020), the supreme court answered a certified question from the Fifth Circuit Court of Appeals and held that a refinancing lender's negligence in preserving its contractual rights does not deprive it of its right to enforce an equitable subrogation lien. This is because the lender's equitable rights arise and become fixed at the time the proceeds from the refinancing loan are used to discharge the earlier debt and are not affected by the new lender's subsequent conduct. *Id*. But the conduct at issue in *Zepeda* was the lender's failure to resolve a curable defect in the loan documents signed at closing, an infirmity not present in the loan to which the lender became subrogated. In contrast, the "infirmity" in PNC's deed of trust lien – the expiration of the limitations period – is, as explained below, as much a problem for the subrogation lien as it is for the deed of trust lien. While subrogation may permit a new lender to assume the prior lender's lien position, the rights assumed by the new lender are limited to only those that could have been asserted by the prior lien holder. *Howard II*, 616 S.W.3d at 584–85; *see also Mid-Continent Ins. Co. v. Liberty Mut. Ins. Co.*, 236 S.W.3d 765, 774 (Tex. 2007).

PNC correctly asserts there is no specific statute of limitations for subrogation actions. *Brown v. Zimmerman*, 160 S.W.3d 695, 700 (Tex. App.—Dallas 2005, no pet.). Instead, the action is subject to the same statute that would apply had the action

been brought by the subrogee. *Guillot v. Hix*, 838 S.W.2d 230, 233 (Tex. 1992). In this case, if the original lender had brought a suit to enforce its real property lien, the suit would be governed by the four-year limitations period found in section 16.035. *Zimmerman*, 160 S.W.3d at 701. Accordingly, the same statute governs PNC's subrogation action seeking that relief. *Id*.

The more difficult issue is determining when PNC's cause of action to enforce its subrogation lien accrued. A claim to foreclose a real property lien must be based on the borrower's failure to pay a secured debt that has either matured under its own terms or had its maturity properly accelerated. *See Wilmington Tr. Nat'l Ass'n. v. Rob*, 891 F.3d 174, 177–78 (5th Cir. 2018); *Famous Koko, Inc. v. Member 1300 Oak, LLC*, No. 05-17-00906-CV, 2018 WL 6065256, at *3 (Tex. App.—Dallas Nov. 20, 2018, no pet.) (mem. op.). Limitations on the lien claim begins to run on the date of maturity. *Holy Cross Church of God in Christ v. Wolf*, 44 S.W.3d 562, 566 (Tex. 2001). Because a refinancing lender steps into the shoes of the original lender in a subrogation claim, the question arises as to whether the maturity date of the original loan or of the refinancing loan controls. Unfortunately, Texas case law gives conflicting answers to this question.

The issue was first addressed nearly one hundred years ago in *Kone v. Harper*, 297 S.W. 294 (Tex. Civ. App. – Waco 1927), *aff'd*, 1 S.W.2d 857 (Tex. Comm'n App. 1928). In *Kone*, the debtor asserted that limitations barred the refinancing lender's subrogation claim because the debt that had been paid off had a maturity

date of more than four years before the foreclosure suit was brought. *Id*. at 299. The debtor contended that, because the refinancing lender steps into the shoes of the original lender for purposes of subrogation, the maturity date of the original loan should control for limitations purposes. The Waco court disagreed, stating that the refinancing acted in the same way as if the original debt had been renewed and extended and, therefore, the relevant maturity date was the one for the new loan. *Id*. at 299-300. Ten years later, in *Hays v. Spangenberg*, 94 S.W.2d 899 (Tex. Civ. App. – Austin 1936, no writ), the Austin court followed *Kone* and held that limitations begins to run on a subrogation claim on the "due date" of the refinancing loan, rather than the date the paid-off loan would have become due. *Id*. at 902.

In 2005, this Court addressed a debtor's assertion of limitations as a defense to a subrogation lien claim in *Brown v. Zimmerman*, 160 S.W.3d at 701. Although we did not directly address the lien claim's accrual date, two opinions out of the United States District Court for the Southern District of Texas, *Gillespie v. Ocwen Loan Servicing, LLC* and *Zepeda v. Federal Home Loan Mortgage Ass'n*, have read *Zimmerman* to hold that an equitable subrogation lien claim accrues at the time the original loan is paid off. *See Gillespie v. Ocwen Loan Servicing, LLC*, No. 4:14-CV-00279, 2015 WL 12582796, at *4 n.5 (S.D. Tex. Oct. 28, 2015); *Zepeda v. Fed. Home Loan Mortg. Ass'n.*, No. 4:16-cv-3121, 2018 WL 781666, at *5 (S.D. Tex.

Feb. 8, 2018), *rev'd*, 967 F.3d 456 (5th Cir. 2020).[2] We do not agree with this reading of our opinion.

The facts in *Zimmerman* were unusual. The case began as a divorce action. *Zimmerman*, 160 S.W.3d at 699. Husband was the founder and president of a bank that refinanced a home loan debt owed by Wife. *Id*. at 698–99. Husband and Wife then signed a separate contract in which they agreed to pay off the refinancing note with proceeds from their life insurance policies. *Id*. at 699. Shortly thereafter, the parties divorced and the separate agreement to pay off the loan was nullified by the trial court. *Id*. Although the real property made the subject of the loan was awarded to Wife, the divorce decree did not address the parties' liability on the refinancing note, and Husband's bank placed a lien on the property. *Id*. Based on these facts, and the unique loan repayment plan, it was unclear when the maturity date of the refinancing loan would have been. But, because the bank's subrogation lien claim was brought less than four years after the refinancing occurred, there was no possible maturity date for the new loan that would have been outside the limitations period. Accordingly, our reference to the date of the refinancing was not to suggest that this was when the claim accrued, but to show that the bank's subrogation action was necessarily brought timely because the note could not have matured more than four years before suit was filed.

[2] This is the same *Zepeda* case that was the subject of the certified question in *Federal Home Loan Mortgage Corp. v. Zepeda*, 601 S.W.3d 763 (Tex. 2020).

In addition, both *Gillespie* and *Zepeda* cite *Kone* and *Hays* for the proposition that a claim for equitable subrogation accrues on the maturity date of the underlying debt secured by the prior lien. *Gillespie*, 2015 WL 12582796, at *4; *Zepeda*, 2018 WL 781666, at *5. As shown above, we read *Kone* and *Hays* as reaching the opposite conclusion. *See Kone*, 297 S.W. at 299; *Hays*, 94 S.W.2d at 902. Two other Texas federal courts have since followed *Gillespie* and *Zepeda* to conclude that the limitations period on an equitable subrogation lien claim begins to run on the maturity date of the note paid off in the refinancing. *See Priester v. Long Beach Mortg. Co.*, No. 4:16-cv-00449, 2018 WL 1081248, at *4 (E.D. Tex. Feb 28, 2018); *De La Cruz v. Bank of New York*, No. A-17-CV-00163-SS, 2018 WL 3018179, at *6 (W.D. Tex. June 15, 2018). All four federal opinions also appear to hold that a subrogation claim could accrue long after the maturity date of the refinancing loan, and *De La Cruz* seems to suggest that acceleration of the refinancing debt may not similarly accelerate the maturity of the original debt. *See De La Cruz*, 2018 WL 3018179, at *6. We view the potential problems created by these holdings as manifold.

Tying the accrual date of the subrogation action to the maturity of the underlying debt recreates the issue resolved in *Kone* and *Hays*. Under the federal cases, if a borrower defaults on a refinancing loan more than four years after the maturity date of the original loan, the refinancing lender no longer has a viable subrogation lien claim. This would severely limit the purpose of equitable

subrogation. As the court said in *Hays*, "[t]he same equitable doctrine which grants the lien should preserve it as security for the debt evidenced by the new note until that note becomes barred." *Hays*, 94 S.W.2d 899.

The reverse scenario is equally problematic. If the maturity date of the original debt is well beyond the maturity date of the refinancing loan, the borrower could arguably be subjected to a subrogation claim many years after the loan became due. Such a result would render the limitations period practically meaningless. It would also potentially force the refinancing bank to wait for an extended period of time after the maturity date of its loan before being able to enforce the subrogation lien.

PNC attempts to resolve this dilemma by arguing that, even though the subrogation lien claim is triggered by the due date of the original loan, the time within which to bring the lien claim is limited to the period in which the refinancing note is "collectable," which is six years after the note matures or its maturity is accelerated. *See* TEX. BUS. & COM. CODE ANN. § 3.118(a). But PNC fails to explain how its subrogation lien claim is enforceable if it has not yet accrued. PNC also fails to explain how the debt can have matured for purposes of its note claim, but not for purposes of its lien claim.

Furthermore, neither PNC nor the federal cases address why acceleration of the refinancing debt would not similarly accelerate the maturity of the original debt. Although the legal fiction of the original debt continues for subrogation purposes,

there is still only one debt. Once accelerated, that one debt is mature. *See Uresti*, 553 S.W.2d at 663. And once mature, any claim to enforce a lien securing that debt accrues. *Khan*, 371 S.W.3d at 353.

We conclude the correct result is the one first reached by *Kone* in 1927. The lender's cause of action to enforce its subrogation lien rights accrues on the date the refinancing loan matures. *Kone*, 297 S.W. at 299. If the maturity of the refinancing loan is accelerated, the debt is mature for purposes of both the lender's contractual rights and its subrogation rights. In this case, that date was June 19, 2009, when the Howards' refinancing loan was accelerated.

Relying on *Kone* and *Hays*, PNC argues that, even if its lien claim accrued when the loan was accelerated, its "equitable lien" should not be subject to the same limitations period as a contractual lien. PNC contends that a lien obtained through equity should be valid for as long as the bank can recover on the note secured by the lien. Although *Kone* and *Hays* contain language that the right to enforce a subrogation lien should extend for as long as the right to collect on the refinancing note, both cases were decided decades before the legislature enacted section 16.035 of the civil practice and remedies code which created a four-year limitations period for lien claims separate from the four-year limitations period for suits on a debt. *See* TEX. CIV. PRAC. & REM. CODE ANN. §§16.035, 16.004 (effective September 1, 1985). When the legislature later created a longer six-year limitations period for suits on negotiable instruments, it did not similarly extend the time within which a

party must bring a claim to enforce a lien securing a negotiable instrument. *See id*. § 16.035; TEX. BUS. & COM. CODE ANN. § 3.118(a) (effective January 1, 1996). Accordingly, the legislature has determined that limitations on lien rights need not be commensurate with limitations on collection rights. "[T]he right to collect and the right to seek a forced sale are two quite different things." *Benchmark Bank v. Crowder*, 919 S.W.2d 657, 663 (Tex. 1996) (quoting *U.S. v. Rodgers*, 41 U.S. 677, 691 (1983)).

What PNC has is an equitable right of subrogation to the previous lender's contractual lien. All suits for the recovery of real property under a real property lien or for the foreclosure of a real property lien are subject to the four year limitations period. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 16.035. PNC cannot, in the name of equity, have more rights than the party to which it is subrogated, and those rights are subject to the same defenses the borrower would have had against the original lender. *See Mid-Continent*, 236 S.W.3d at 774. If this claim had been brought by the original lender, it would have to have been filed within four years after the debt matured. *Zimmerman*, 160 S.W.3d at 700. Because PNC did not file its subrogation lien claim within four years after the date the debt was accelerated, it is time-barred.

We affirm the trial court's judgment declaring any lien or power of sale held by PNC on the Howards' property void and unenforceable.

/Amanda L. Reichek/
AMANDA L. REICHEK
JUSTICE

171484F.P05

Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

PNC MORTGAGE, A DIVISION OF PNC BANK, N.A. SUCCESOR TO NATIONAL CITY BANK AND NATIONAL CITY MORTGAGE, A DIVISION OF NATIONAL CITY BANK OF INDIANA, Appellants

No. 05-17-01484-CV V.

JOHN HOWARD AND AMY HOWARD, Appellees

On Appeal from the 199th Judicial District Court, Collin County, Texas
Trial Court Cause No. 199-01559-2010.
Opinion delivered by Justice Reichek. Justices Molberg and Garcia participating.

In accordance with this Court's opinion of this date, the judgment of the trial court declaring any lien or power of sale held by PNC MORTGAGE, A DIVISION OF PNC BANK, N.A. SUCCESOR TO NATIONAL CITY BANK on the property of JOHN HOWARD AND AMY HOWARD void and unenforceable is **AFFIRMED**.

It is **ORDERED** that appellees JOHN HOWARD AND AMY HOWARD recover their costs of this appeal from appellant PNC MORTGAGE, A DIVISION OF PNC BANK, N.A. SUCCESOR TO NATIONAL CITY BANK AND NATIONAL CITY MORTGAGE, A DIVISION OF NATIONAL CITY BANK OF INDIANA.

Judgment entered September 17, 2021

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